Volume XX] *September, 1905* [*Number 3*

POLITICAL SCIENCE QUARTERLY

TREATIES AND EXECUTIVE AGREEMENTS

1. *Question as to general arbitration treaties*

DURING November and December, 1904, and January, 1905, there were signed at Washington by Mr. Hay, on the part of the United States, and by the ministers of various other countries, ten general treaties of arbitration. The treaties first concluded were those with France and Switzerland, which were signed on November 1, 1904. Then came treaties in the order of date with Portugal, Great Britain, Italy, Spain, Austria-Hungary, Mexico, and Sweden and Norway, that with Sweden and Norway being signed on January 20, 1905. All these agreements were duly submitted to the Senate. A similar treaty was afterwards signed with Japan; but, in view of the differences which had arisen as to the instruments previously negotiated, it was not transmitted to the Senate.

All the treaties above mentioned were based upon the same model, namely, a treaty of arbitration between Great Britain and France, which was concluded at London, on October 14, 1903. The signing of this treaty was followed by the conclusion of numerous conventions between other European powers in precisely similar terms. The treaties signed by Mr. Hay varied from them only in the formal parts, the language defining the questions to be arbitrated and the mode of procedure being precisely the same.

The substantive clauses of the American treaties, like those of the European treaties, were embraced in two articles. Of these, the first reads as follows:

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Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent court of arbitration established at The Hague by the convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of the two contracting states, and do not concern the interests of third parties.

The second article reads thus:

In each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure.

While the treaties were pending before the Senate, various questions were raised as to their probable effect. It was suggested, among other things, that they might require the United States to submit to arbitration claims against some of the individual states of the Union, on account of repudiated or unpaid debts. In order to obviate this apprehension, the president addressed a letter to Senator Cullom, chairman of the foreign relations committee of the Senate, setting forth his views as to the inadmissibility of such claims and giving an assurance that during his administration they would not be entertained. A more serious question afterwards arose.

On January 20, 1905, there was signed at Santo Domingo City, by Commander A. C. Dillingham, U. S. N., and Mr. Dawson, the American minister, on the one part, and by the Dominican minister of foreign affairs, on the other, a protocol under which the United States was to guarantee the integrity of the Dominican territory, undertake the adjustment of foreign claims, administer the finances on certain lines, and assist in maintaining order. As it was stipulated that the arrangement should take effect February 1, the inference was widely drawn that there existed an intention to treat the protocol as a perfected international agreement without submitting it to the Senate. Such an intention was soon afterwards disclaimed by the administration; but the incident resulted in the raising of

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the broad question as to the power of the president to enter into international agreements of any kind without the advice and consent of the Senate, and the discussion was soon found to involve the second article of the arbitration treaties. By this article, as we have seen, it was provided that the president should in each individual case, before appealing to the permanent court of arbitration, conclude a "special agreement," defining the matter in dispute and the scope of the arbitrators' powers and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure. As announced in the press, the position was taken by senators that the "special agreement" required in each case must be in the form of a treaty, duly submitted to the Senate for its advice and consent. The president, on the other hand, took the ground that the arbitration treaties, if approved by the Senate and afterwards ratified, would in themselves constitute complete legislative acts, which it would be within his powers as executive to carry into effect, as occasion might arise; and that, if a new treaty were required in each particular case, the general treaties would fail to accomplish their primary purpose and would in reality constitute a step backward, rather than a step forward, in the development of the practice of international arbitration by the United States. These views the president embodied in a letter to Senator Cullom, which was in the nature of a protest against the position which senators were understood to have taken. On receiving this letter, the Senate, with only seven dissenting votes, immediately amended the treaties by striking out of the second article the word "agreement" and substituting for it the word "treaty," so that it would be necessary in each individual case before proceeding to arbitration to conclude a special "treaty," defining the matter in dispute and the scope of the arbitrators' powers, as well as fixing the periods for the formation of the tribunal and the several stages of the procedure. When the treaties as thus amended were returned to the president, it was announced that he would not submit them in their amended form to the other governments concerned but would consider the action of the Senate as constituting in principle a disapproval of them.

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As the record stands, issue was thus joined on the broad question whether it is within the power of the president to conclude any "agreement," or at any rate any arbitral agreement, with a foreign power without the advice and consent of the Senate. As regards this question, the president appears upon the affirmative side, and the Senate apparently upon the negative. No doubt, if the subject had been further discussed, the issue might have been brought within narrower limits. It will not be pretended by any one that the president can make any and every kind of an international agreement without the co-operation of the Senate, for the constitution expressly requires that "treaties" shall be made by him "by and with the advice and consent" of that body, signified by the approving vote of two-thirds of the senators present. On the other hand, it can easily be demonstrated that the word "treaties," as used in the constitutional law of the United States, does not embrace any and every kind of international agreement.

2. *The terms "treaty," "convention," "protocol"*

In diplomatic literature, the words "treaty," "convention," and "protocol" are all applied, more or less indiscriminately, to international agreements. The words "convention" and "protocol" are indeed usually reserved for agreements of lesser dignity, but not necessarily so. In the jurisprudence of the United States, however, the term "treaty" is properly to be limited, although the federal statutes and the courts do not always so confine it, to agreements approved by the Senate. Such an agreement may be and often is denominated a "convention," and perchance might be called a "protocol;" but it is also, by reason of its approval by the Senate, in the strict sense a "treaty," and possesses, as the product of the treaty-making process, a specific legal character. By the constitution of the United States, a "treaty" is a "supreme law of the land," having the force of an act of congressional legislation and overriding any inconsistent provisions not only in the constitutions and laws of the various states, but also in prior national statutes. It is at once an international compact and a municipal law, and in its latter character directly binds the

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courts and the individual inhabitants of the country. In this respect the legal system of the United States differs from that of most other governments, under which a "treaty," although it represents a binding international compact, becomes legally operative upon courts and individuals only when the legislature adopts it and enacts it into law. In England, for instance, an extradition treaty may be executed only where an act of Parliament already exists, or is passed, to render it effective; in the United States such a treaty may be immediately executed by virtue of its double character as an international compact and a municipal law. By reason of its added municipal character, a "treaty" in the United States has a superior legal efficacy; but it is for the same reason peculiarly exposed to degradation by the action of the legislature, since the courts have held that it is, as a "law," subject to abrogation or "repeal," even by implication, by a later and inconsistent act of Congress. The international obligation may not be thus destroyed, but the government of the United States is disabled from performing it.

3. *Examples of purely executive agreements*

Such being the nature and meaning of the term "treaty" in the jurisprudence of the United States, we find that the government has been in the habit of entering into various kinds of agreements with foreign powers without going through the process of treaty-making. The conclusion of agreements between governments, with more or less formality, is in reality a matter of constant practice, without which current diplomatic business could not be carried on. A question arises as to the rights of an individual, the treatment of a vessel, a matter of ceremonial, or any of the thousand and one things that daily occupy the attention of foreign offices without attracting public notice; the governments directly concerned exchange views and reach a conclusion by which the difference is disposed of. They have entered into an international "agreement"; and to assert that the secretary of state of the United States, when he has engaged in routine transactions of this kind, as he has constantly done since the foundation of the government, has violated the con-

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stitution because he did not make a treaty, would be to invite ridicule. Without the exercise of such power it would be impossible to conduct the business of his office.

But, in addition to agreements made in the transaction of current business, we find that the executive has entered into international agreements of a more formal kind, without resorting to the treaty-making process.

The agreement of 1817, for the limitation of naval armaments on the Great Lakes, was made and carried into effect by the executive, though it was afterwards submitted to the Senate. By a protocol signed at London, December 9, 1850, by Abbott Lawrence, American minister, on the part of the United States, and by Viscount Palmerston, on the part of Great Britain, it was agreed that the British crown should cede to the United States Horseshoe Reef in Lake Erie, and that the United States should accept it, on the conditions of erecting a light-house there and maintaining no fortifications. On receipt of the protocol, Mr. Webster, as secretary of state, on January 7, 1851, instructed Mr. Lawrence to acquaint the British government that the arrangement was "approved" by the government of the United States. This Mr. Lawrence did on the 17th of the succeeding month. Congress made appropriations for the erection of the light-house, which was built in 1856.[1] The validity of the title thus gained will hardly be disputed. The cession, which the executive had arranged, having been adopted by Congress, the territory came completely within the jurisdiction and control of the United States without any "treaty." We hold the Hawaiian Islands by no better tenure. Two successive attempts to annex them by treaty having failed, they were acquired under a joint resolution of Congress. Texas, also, was annexed by a joint resolution, but, as it was at the same time admitted as a state, it stands in a legal category distinguishable from that of Hawaii.

In 1882, an arrangement was effected between the United States and Mexico, by means of an exchange of notes, for the reciprocal passage of troops of the two countries across the

[1] 9 Statutes at Large, 380, 627; 10 *ibid.* 343.

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border when in pursuit of hostile Indians.[1] On June 25, 1890, an agreement, in the form of a protocol, was entered into on the same subject, and this agreement was from time to time renewed with amendments. The federal troops of the two countries were permitted to cross the international boundary in pursuit of certain hostile Indians in the uninhabited and desert part of the line, which were defined as "all points that are at least ten kilometers distant from any encampment or town of either country." It was expressly stipulated that no such crossing should take place between two certain specified points. There were various other provisions requiring notice of crossing to be given if possible, and permitting the chastisement of other hostiles whom the troops might chance to meet.[2]

One of the most important agreements ever made by the executive without submission to the Senate was the peace protocol with Spain of August 12, 1898. By this protocol provision was made for a general armistice between the two countries. This stipulation was no doubt within the powers of the president as commander-in-chief of the army in time of war, but there were other provisions of a different nature and of far-reaching importance. Not only did the protocol stipulate that Spain should relinquish all claim of sovereignty over and title to Cuba, and should cede to the United States Porto Rico and other islands under Spanish sovereignty in the West Indies and an island in the Ladrones to be selected by the United States, but it also provided that Spain should "immediately evacuate" Cuba, Porto Rico and other Spanish islands in the West Indies, and to this end within ten days should appoint commissioners, who within thirty days were to meet commissioners of the United States at Havana, in Cuba, and San Juan, in Porto Rico, respectively, for the purpose of arranging and carrying out the details of the evacuation of Cuba and the adjacent islands. Commissioners to negotiate the definitive peace were to meet at Paris not later than October 1, 1898. They met accordingly, and, pending the negotiations

[1] Foreign Relations of the United States, 1882, pp. 419–426.

[2] Report of Mr. Olney, secretary of state, to the president, Dec. 7, 1896, For. Rel. 1896. See, also, *ibid.* p. 438.

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which resulted in the signature of the treaty of peace on December 10, 1898, Porto Rico was evacuated and the preparations for the evacuation of Cuba were proceeding. It may be said that the evacuation of Cuba was clearly within the scope of the joint resolution under which the president was directed to intervene in Cuba, but this could not be said with regard to the anticipatory evacuation of Porto Rico and other Spanish islands in the West Indies, which was clearly an incident of the cession.

Another remarkable exercise by the president alone of the power to make agreements with foreign countries is found in the protocol concluded at Peking on September 7, 1901, between China and the allied powers who had coöperated in the march to Peking for the relief of the foreign legations. This protocol was signed on the part of the United States by Mr. W. W. Rockhill, now minister to China, who was then acting as a special commissioner to China by executive appointment alone. It embraced numerous topics, including reparation by China for the murder of the German minister at Peking, the infliction of punishment on the principal authors of the outrages and crimes committed against foreign governments and their nationals, the prohibition by China of the importation of arms and ammunition as well as of the materials exclusively used for their manufacture, the payment to the allies of an indemnity of 450,000,000 taels, the constitution of an extraterritorial quarter for the use of the foreign legations in Peking, the temporary occupation by the powers of certain points in order to keep open the communication between the capital and the sea, and undertakings on the part of China to negotiate amendments to her existing treaties, to improve the navigability of the Peiho river, and to transform her office of foreign affairs into a ministry of foreign affairs, which was to take precedence over the six ministries of state.[1]

4. *Agreements under acts of Congress*

There are certain definite classes of international agree-

[1] See Report of Mr. Rockhill, Nov. 30, 1901, Senate Doc. 67, 57th Congress, 1st session; reprinted as Appendix to Foreign Relations, 1901, vol. iii, pp. 312–318.

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ments which are made by the executive under acts of Congress. It is a peculiarity of these agreements that, so long as the statute under which they are concluded stands unrepealed, they have precisely the same municipal force as treaties, being in effect laws of the land. And sometimes they relate to subjects which might be and perhaps have been dealt with by the treaty-making power.

(1) *Postal "treaties"*

As the first illustration of this type of agreements we may take postal "treaties" or conventions. Originally it seems to have been supposed that such agreements must be submitted to the Senate. On March 6, 1844, a postal convention was signed between the United States and New Granada, with special reference to the isthmus of Panama. It was transmitted by President Tyler to the Senate May 7, and on the 13th it was read the first and second times by unanimous consent, and was ordered to be referred to the committee on foreign relations and to be printed in confidence for the use of the Senate. It was approved without amendment June 12.[1] A similar course was taken in other cases; but the procedure was altogether changed by the act of Congress of June 8, 1872, entitled "An act to revise, consolidate and amend the statutes relating to the post office department."[2] By section 167 of this act it was provided that, "for the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them," the postmaster-general, "by and with the advice and consent of the president," might "negotiate and conclude postal treaties or conventions," and might "reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries."[3] By section 20 of the same act, the postmaster-general is required to transmit a copy of each postal convention concluded with a foreign government to the secretary of state, who is to furnish a copy to the public printer for publication; but the proof-sheets are to be revised in the

[1] Executive Journal of the Senate, vol. vi (1841–45), pp. 275, 276, 321.

[2] 17 U. S. Statutes at Large, 283. [3] 17 *ibid.* 304.

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post office department.[1] These provisions have since governed the negotiation and conclusion of postal treaties, and they are now embodied in the revised statutes of the United States, as sections 398 and 399.

(2) *Reciprocity arrangements*

Another class of international agreements, concluded by the government of the United States under the authority of an act of Congress, is that of arrangements with foreign powers in relation to commercial reciprocity. Such were the agreements made by the United States under section 3 of the act of October 1, 1890, commonly called the McKinley act. By section 3 of this act the president was authorized to impose duties at certain rates on specified articles, whenever, in his judgment, the duties imposed by the country of exportation on goods imported from the United States were, in view of the free admission of such specified articles into the United States, "reciprocally unequal or unreasonable." This retaliatory provision was used for the purpose of securing reciprocal commercial agreements with other powers; and ten such agreements were in fact concluded with Austria-Hungary, Brazil, the Dominican Republic, Germany, Great Britain, Guatemala, Honduras, Nicaragua, Salvador and Spain. These agreements remained in force till they were terminated by section 71 of the tariff of August 27, 1894, generally known as the Wilson-Gorman act.

The subject of commercial arrangements is also provided for by the act of July 24, 1897, called the Dingley act. By section 3 of this act, the president is authorized to enter into negotiations with the governments of countries exporting to the United States certain specified articles, with a view to making commercial agreements "in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States"; and whenever an agreement is made by which the products and manufactures of the United States are, in his judgment, admitted on reciprocal and equivalent terms, he is authorized to suspend by proclamation the

[1] 17 U. S. Statutes at Large, 287.

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imposition and collection of duties on the articles in question. By section 4 of this act the president is also authorized to make certain concessions whenever he shall have entered into a reciprocity treaty with a foreign country by and with the advice and consent of the Senate. Under the third section of the act the president has concluded and carried into effect commercial agreements with France, May 28, 1898; with Portugal, May 22, 1899, and January 11, 1900; with Germany, July 10, 1900; and with Italy, February 8, 1900.

(3) *Discriminating duties, copyrights, and trade marks*

In numerous cases, in addition to those first mentioned, the president has been invested by Congress with power the exercise of which has involved the making of formal or informal international agreements. As examples, we may take the acts of March 3, 1815; January 7, 1824; May 24, 1828; June 19, 1886; April 4, 1888, and July 24, 1897, with reference to the suspension of discriminating duties. The power thus vested in the president constantly has been and still is exercised by him, sometimes on the strength of understandings reached by ordinary correspondence, and sometimes on the strength of more formal diplomatic agreements.

A power similar to that exercised by the president with regard to the suspension of discriminating duties is conferred upon him by section 13 of the act of March 3, 1891, amending the provisions of the revised statutes of the United States in relation to copyrights. By this section the president is authorized by his proclamation to admit the citizens of foreign nations to the privileges of copyright in the United States, either when such nations extend the benefits of copyright to citizens of the United States on substantially the same basis as to their own citizens, or when they are parties to a reciprocal international copyright agreement to which the United States may at its pleasure adhere. Under the first condition the president, after exchange of correspondence, has by proclamation extended the benefits of the law to citizens of Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany,

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Great Britain, Italy, Mexico, the Netherlands, Portugal and Spain.[1]

Agreements with regard to the protection of trade marks have been concluded by the exchange of notes, under section 1 of the act of March 3, 1881, with the Netherlands, February 10 and 16, 1883, and with Switzerland, April 27 and May 14, 1883.[2] In 1894 Mr. Gresham, as secretary of state, declined to approve a declaration for the protection of trade marks signed at Athens by the American minister and the Greek minister of foreign affairs, on the ground that a formal convention should be submitted to the Senate.[3] In numerous instances, the subject of patents and trade marks and the general protection of industrial property have been regulated by treaties duly submitted to the Senate.

(4) *Indian "treaties"*

During the first eighty years of government under the constitution, agreements with the Indian tribes were made exclusively by the president and the Senate, in the exercise of the treaty-making power. Since 1871, however, the subject has been dealt with exclusively by the president and Congress. This circumstance is due to the act of Congress of March 3, 1871,[4] now incorporated in section 2079 of the revised statutes, by which it is expressly provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Previously to this statute, the president, by the act of July 5, 1862,[5] now embodied in section 2080 of the revised statutes, was, whenever the tribal organization of any Indian tribe was in actual hostility to the United States, authorized by proclamation to declare all treaties with such tribe to be abrogated,

[1] For the act of March 3, 1891, see 26 U. S. Statutes at Large, 1110; also, Foreign Relations, 1892, pp. 258–266.

[2] 21 U. S. Statutes at Large, 502; Senate Doc. 20, 56th Congress, 2d session, pp. 334, 337.

[3] Foreign Relations, 1895, pp. 759, 763, 765.

[4] 18 Statutes at Large, 176.

[5] 12 *ibid.* 528.

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if in his opinion it could be done consistently with good faith and with legal and national obligations.

The passage of the act of 1871 was strongly opposed by certain members of the House as well as of the Senate, on the ground that it involved an infringement of the treaty-making power vested in the president and the latter body. It was admitted that if the president should undertake to make a treaty with the Indians, Congress could not interfere with his doing so, by and with the advice and consent of the Senate; but it was, on the other hand, maintained that Congress had the power to declare whether the tribes were independent nations for the purposes of treaty-making, and to render its declaration effective by refusing to recognize any subsequent treaties with them; and this view prevailed.[1]

(5) *The modus vivendi*

The first examples given above of international pacts made by the president, without consulting the Senate, were agreements entered into by him alone, in the exercise of his own authority. There is a well defined type of agreement, known as the *modus vivendi*, which has been regarded as falling within the president's powers. As the name indicates, a *modus vivendi* is in its nature a temporary or working arrangement, made in order to bridge over some difficulty, pending a permanent settlement.

By an exchange of memoranda and correspondence in April and June, 1885, a diplomatic agreement was entered into between the United States and Great Britain, by which the fishing privileges granted to American citizens in Canadian waters by the treaty of May 8, 1871, which would otherwise have expired on July 1, 1885, were to continue throughout the season of 1885. This arrangement in no way affected the collection of duties on fish and fish products in the United States, but was entered into by the British government in consideration of the president's undertaking to recommend to Congress, on its assembling in December, 1885, the appointment of a joint

[1] See, especially, *Congressional Globe*, 41st Congress, 3d Session (1870–71), part 2, pp. 763–765; part 3, pp. 1821–1825.

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commission to consider the question of fisheries and trade relations.[1]

On February 15, 1888, a treaty commonly known as the Bayard-Chamberlain convention, was signed at Washington with a view to the permanent settlement of the fisheries controversy. This treaty was in the following August rejected by the Senate; but, on the day on which it was signed, a *modus vivendi* was entered into by the negotiators by which a temporary arrangement was made for a period not exceeding two years. This arrangement was communicated by the president to the Senate, for its information, when the treaty was submitted for ratification.

By a *modus vivendi* concluded at Washington on June 15, 1891, the killing of fur seals in Bering sea, whether by American citizens or by British subjects, was suspended till the following May. This suspension, which applied only to that part of Bering sea eastward of the water line of demarcation in the treaty of cession of 1867, was established with a view to the conclusion of a treaty for the arbitration of the entire dispute. Such a treaty was made in the following year.

On October 20, 1899, a *modus vivendi* was effected by means of an exchange of notes between Mr. Hay, secretary of state, and Mr. Tower, British chargé d' affaires *ad interim* at Washington, for the purpose of fixing a provisional boundary between Alaska and the Dominion of Canada in the vicinity of Lynn canal. This agreement remained in force till the boundary question was definitively settled by the decision of the joint commission under the treaty of January 24, 1903.

Protocols of agreement have on various occasions been made by the executive with a view to future negotiations. Protocols of this kind were signed with Costa Rica and Nicaragua on December 1, 1900, with a view to negotiations for the construction of an interoceanic canal by way of Lake Nicaragua.

(6) *The settlement of pecuniary claims*

Agreements of another class, the making of which has been considered to be within the competence of the executive,

[1] Foreign Relations, 1885, pp. 460–469.

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are those providing for the settlement of pecuniary claims, especially of private individuals, against foreign governments. Such an agreement the president no doubt may in any case submit to the Senate, if he sees fit to do so; and we find, especially in former times, that this course was often taken.

(1) *By treaty*

Thus, provision was made for the settlement of pecuniary claims, either directly or by means of arbitration, under article vi of the treaty with Great Britain, commonly called the Jay treaty, of November 19, 1794, for the adjudication of claims of British subjects against the United States growing out of legal impediments interposed to the collection of debts under the treaty of peace of 1782–1783; under article vii of the same treaty, for the adjudication of claims of citizens of the United States against Great Britain on account of violations of neutral rights and of claims of British subjects against the United States growing out of failures of neutral duty; under article v of the convention with Great Britain of October 20, 1818, for the arbitration of claims of citizens of the United States against the British government, growing out of the carrying away of slaves in violation of article i of the treaty of Ghent; under the convention with Great Britain of February 8, 1853, for the arbitral adjustment of claims of the citizens of each country against the government of the other; under the convention with Great Britain of July 1, 1863, for the adjudication of the claims of the Hudson's Bay Company and the Puget's Sound Agricultural Company against the United States; under articles i–xi, inclusive, of the treaty of Washington of May 8, 1871, for the arbitration of the "Alabama" claims; under article xii of the same treaty for the determination of claims of citizens of each country against the government of the other, other than the "Alabama" claims, arising during the Civil war in the United States; under articles xx–xxv, inclusive, of the same treaty for the arbitration of the question what, if anything, was due to the British government from the United States on account of the arrangement made with regard to the fisheries; under the convention of February 8, 1896, for the

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adjudication of British claims against the United States growing out of the Bering sea controversy; and under the tripartite convention between the United States, Germany and Great Britain, of November 7, 1899, for the adjudication of the question of liability for the payment of claims of the citizens or subjects of the contracting parties growing out of the unwarranted military action of any of them in Samoa. By article xxi of the treaty with Spain of October 27, 1795, provision was made for the adjudication of claims of citizens of the United States against Spain in consequence of the seizure of their vessels and cargoes by subjects of his Catholic majesty during the then recent war between Spain and France. Provision was made by the convention of August 11, 1802, for the adjudication of other claims of American citizens against Spain and of Spanish subjects against the United States; but, although the ratifications of this convention were afterwards exchanged, it was never carried into effect, and the subject to which it related was dealt with in the Florida treaty of February 22, 1819, by which all claims of the citizens of either country against the government of the other were renounced and the United States undertook (article xi) to make satisfaction for the claims of its own citizens to an amount not exceeding $5,000,000. By article ix of the same treaty the United States undertook to compensate the Spanish inhabitants of Florida for injuries suffered by the operations of the American army in that province. Claims against Spain arising during her war with her American colonies were directly settled by the Van Ness convention of February 17, 1834. Many claims on the part of citizens of the United States against France grew out of the wars in which that country was involved prior to the peace of Amiens. Some of these were settled under the indemnity convention of April 30, 1803, which forms one of the series of treaties relating to the Louisiana cession, as part of the price of which certain classes of the claims were assumed and paid by the United States. Subsequent claims against France, as well as certain claims of France against the United States, were directly settled by the Rives convention of July 4, 1831. A mutual adjustment of claims by the same

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countries through a mixed commission was accomplished under the convention of January 15, 1880. Claims of citizens of the United States against Denmark originating in the Napoleonic wars were directly settled by the treaty of March 28, 1830, as likewise were similar claims against Naples by the convention of October 14, 1832. Provision was made by the treaty of April 11, 1839, for the adjudication of claims of citizens of the United States against Mexico, and various claims which failed of adjustment under this convention were assumed and paid by the United States under the treaty of Guadalupe Hidalgo. By a convention of July 4, 1868, all claims of the citizens of either country against the other which had arisen since the signature of the last-named treaty were submitted to arbitration. Claims of citizens of the United States against Peru were directly settled by a convention signed at Lima on March 17, 1841. By a convention with the same country of December 20, 1862, the claims of the owners of the American vessels "Georgiana" and "Lizzie Thompson" against the government of Peru were submitted to the king of the Belgians as arbitrator, but the claims were afterwards withdrawn by Mr. Seward, and no decision was rendered. A convention for the mutual adjustment of claims as between the United States and Peru by means of a mixed commission was concluded on January 12, 1863. A similar convention was entered into on December 4, 1868. Claims of citizens of the United States against Brazil were directly settled by the convention of January 27, 1849. By a treaty signed on February 26, 1851, the claims of citizens of the United States against Portugal growing out of the destruction of the brig "General Armstrong" by the British at Fayal, in 1814, was submitted to Louis Napoleon as arbitrator. On September 10, 1857, a convention was concluded at Washington for the adjudication of claims of citizens of the United States against New Granada, especially of those growing out of the Panama riot of 1856, and the powers of the commission organized under this convention were extended by the convention of February 10, 1864. In 1821, a quantity of silver, representing the proceeds of sales of merchandise imported into Peru by the American barque "Macedonian" was forcibly taken in the val-

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ley of Sitaña by order of Lord Cochrane, then a vice-admiral in the Chilean navy. The claims growing out of this transaction were, under a convention concluded November 10, 1858, referred to the king of the Belgians. Numerous claims against China were settled by a convention of November 8, 1858. By a convention of February 4, 1859, the claims of the United States and Paraguay Navigation Company against the government of Paraguay were submitted to arbitration. A settlement of all claims of citizens of the United States against Costa Rica for injuries to persons or property was effected by means of a mixed commission under the convention of July 2, 1860. A mutual adjustment of claims as between the United States and Ecuador was effected in a similar manner under the convention of November 25, 1862. The claim of Julio R. Santos, a naturalized citizen of the United States, against the government of Ecuador, growing out of his arrest and detention in that country in 1884 and 1885, was adjudicated under the convention of February 28, 1893. Provision was made for the arbitral settlement of claims against Venezuela by the convention of April 25, 1866; but the proceedings of the commission were set aside and the claims retried under the convention of December 5, 1885. The claim against Venezuela, growing out of the seizure of the vessels of the Venezuela Steam Transportation Company, an American corporation, was settled by a mixed commission under the convention of January 19, 1892. By a convention between the United States and Denmark of December 6, 1888, the claims against Denmark, known as the Carlos Butterfield claims, were submitted to Sir Edward Monson, then British minister at Athens, as arbitrator. Under a convention between the United States and Chile of August 7, 1892, all claims of citizens of either country against the government of the other, growing out of acts committed by the civil or military authorities, were adjudicated by means of a mixed commission. This convention was revived by the convention of May 24, 1897, in order that unfinished business might be disposed of. We thus have thirty-nine cases in which treaties have been made by the United States for the purpose of settling pecuniary claims. It is to be observed, however, that in only twenty cases were the

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claims against the foreign government alone. In fourteen cases there were claims against both governments, and in five, claims against the government of the United States alone; in other words, in nineteen instances the settlement embraced claims against the United States; and, as the executive is forbidden to bind the government of the United States to the payment of money in the absence of authority of law, the president has never undertaken to settle claims against the United States except by means of a treaty, or by means of an agreement concluded *ad referendum* to Congress.

(2) *By executive agreement*

But, as has heretofore been pointed out, pecuniary claims against foreign governments have constantly been settled by the president, and no question as to his possession of such a power, apart from discussions as to its possible limitations, appears ever to have been seriously raised. We, therefore, find in the books little that bears upon the subject; but, in at least one case in which a foreign government sought to qualify an agreement made with the president, the validity and finality of his action were vigorously asserted by the government of the United States.

On November 29, 1886, Mr. Moret, Spanish minister of foreign affairs, informed Mr. Curry, the American minister at Madrid, that the council of ministers had decided to settle the claim of Antonio Maximo Mora, a naturalized citizen of the United States of Cuban origin, against the government of Spain, growing out of the embargo of his property in Cuba, by paying the sum of $1,500,000. This sum, said Mr. Moret, was to be paid by a charge on the Cuban budget; but, as the colonial budget was not in a condition to support such a sum at one time, the government had reserved the determination of the most practicable mode of payment, of which due information would be given. On December 7, Mr. Curry, under instructions of his government, accepted this offer; and a clause was inserted in the Cuban budget of 1887–88 for the payment of the money. This budget, however, was not passed, the Cortes avoiding action upon it by renewing the appropriations

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of the preceding year; and when, in April, 1888, the colonial budget for 1888–89 was submitted, the provision for payment was omitted. When Mr. Curry inquired as to the reason for the omission, Mr. Moret replied that, in view of the debates which had taken place in the Chamber of Deputies, the government was convinced that the Chamber would not vote the money unless the "totality" of American claims was settled, including those of Spain against the United States. At the same time, Mr. Moret declared that the government did not assume to alter what had been agreed on, but must judge when it would be opportune to lay the matter before the Cortes. The government of the United States expressed its confidence that "the Spanish government would not repudiate the arrangement which was deliberately concluded in its name and by its authority." Nevertheless, in consequence of the opposition manifested in the Cortes to the settlement which had been made, Mr. Moret was transferred to the ministry of the interior, and was succeeded in the ministry of foreign affairs by the Marquis de la Vega de Armijo. The latter, in August, 1888, stated that the government intended to satisfy, as far as lay in its power, the government of the United States, and expressed the belief that the Cortes would vote the money if the payment of the Mora claim "coincided" with the payment of the claims of Spain against the United States. With reference to this statement, Mr. Bayard, as secretary of state, on September 17, 1888, declared that, so far as the minister's note affirmed "the inviolability of the settlement arrived at in the Mora case and its removal from the sphere of discussion," it was satisfactory and fulfilled "the expectations that had been confidently entertained in regard to the observance by the Spanish government of the agreement heretofore concluded." Mr. Bayard was not indisposed to include the "payment" of the Mora claim with the "settlement" of other claims, if this could be done within a reasonable time; but he declared that the "sum agreed to be paid" in the Mora case might "fairly be treated as a debt due and withheld by Spain from the United States, upon which interest should justly be computed from the time the agreement was concluded." Again, on December 18, Mr. Bayard de-

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clared that the claim had been "conclusively adjusted for a specific sum and only awaits payment by the Spanish government." Similar ground was taken by Mr. Blaine, Mr. Bayard's successor as secretary of state, who adopted the statement of Mr. Curry that by the settlement "the case was raised from the debatable and negotiable ground which it had previously occupied to the height of an international compact, binding upon both governments." In the same paper, Mr. Blaine said "that by the most formal and sacred of international compacts the faith and honor of the Spanish government" had been "directly pledged" to the payment of the claim, and that the president was "unwilling to allow the execution of the absolute settlement of the Mora case to be made dependent upon the further settlement of other claims." In February, 1893, Mr. Foster, Mr. Blaine's successor, referring to a remark made by the American minister at Madrid as to the possible conclusion of a "convention for the adjustment of the Mora" claim and the claims of Spanish subjects against the United States, said: "The Mora claim has been regarded by this government as already a liquidated and adjusted claim, only awaiting an appropriation by the Spanish Cortes for its final payment. It should not therefore be placed in the category of unadjusted claims." Mr. Gresham, Mr. Foster's successor, writing to Mr. Taylor, the American minister at Madrid, on July 14, 1893, declared that the United States "could not recognize parliamentary difficulties in the way of securing an appropriation for the Mora claim as in any way relieving Spain from her distinct and unconditional obligation to pay that claim." In a note of December 29, 1894, to the Spanish minister of state, Mr. Taylor declared that the United States had reached the "irrevocable conclusions," (1) that, "when the proposition of settlement was accepted, an international convention was concluded," precluding the discussion of all questions but that of payment; (2) that the "unconditional promise to pay carried with it the obligation to pay in a reasonable time;" (3) that the United States would "not consent" that payment should "depend upon the willingness of the Cortes to make the appropriation," or upon the final adjustment of claims asserted by Spain

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against the United States. This presentation of the subject was approved by Mr. Gresham, who, in reply to arguments of the Spanish government that the Mora case was not "one of those matters of strict justice which require immediate reparation," and that the agreement to pay the claim was conditional and not unconditional, reaffirmed the position that the agreement was "unconditional," and further declared that all departments of the Spanish government were bound by it, and that no one department could nullify it, and that, whether the Spanish government did or did not receive the income from Mora's estates was a question "immaterial" to the "rights" of the United States or the "obligations" of Spain. Nevertheless, delay in the payment of the money continued, and at length Congress, by a joint resolution approved March 2, 1895, requested the president "to insist upon the payment of the sum agreed upon between the governments of Spain and the United States in liquidation of the claim of Antonio Maximo Mora against the government of Spain, with interest from the time when the said amount should have been paid under the agreement." [1] Instructions in conformity with the resolution were sent to the legation of the United States at Madrid, and like representations were made to the Spanish minister at Washington, urging an immediate payment on account and an arrangement for the early discharge of the remainder, should Spain be unable to pay the full amount at once. On July 20, 1895, the Spanish minister at Washington handed to Mr. Olney the text of a resolution of the council, approved by the queen regent, in which it was stated that, "in view of the facts shown of record and of the conclusions formulated by the ministers and a sub-committee of reference," it had been decided to notify the United States that Spain, "in fulfilment of the engagement contracted by the notes exchanged on the 29th of November and the 7th of December, 1886," was prepared to proceed to the payment of 1,500,000 pesos in three instalments, the form and date of payment to be determined by agreements. On the 10th of the following August an agreement, signed by

[1] For the correspondence and the joint resolution, see Foreign Relations, 1894, appendix i, pp. 364–450; *ibid.* 1895, part ii, p. 1163.

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Mr. Olney, as secretary of state, and by Mr. Depuy de Lôme, Spanish minister, and by two representatives of the claimant and other interested persons, was entered into for the payment, on or before September 15, of 1,500,000 gold pesos, "in full discharge and satisfaction not only of the principal sum agreed to be paid," but also of any amount that might be claimed to be due as interest. This payment was duly made.[1]

The conclusiveness of the settlement was thus finally maintained, in spite of Spain's contention that the agreement should be treated as having been made subject to the approval of the Cortes. No matter what view might be taken of this contention, the way was open to Spain to make it, since the country was in a state of tranquility and all the departments of the government were in the full exercise of their constitutional functions. Had a dictatorship existed and the constitutional guarantees been suspended, the case would have been obviously different. Such a condition of things has often existed even in recent years, especially in the countries of Spanish America, where international agreements of the most important character have been entered into and carried into effect by the chief executive in the exercise of dictatorial powers. Even territorial questions have been so settled. The treaty of commerce, navigation, boundaries and extradition between Brazil and Bolivia of March 27, 1867, was concluded and ratified on the part of Bolivia by the president *ad interim* of that country. The arbitral agreements made with Venezuela in 1903, under which claims against that government amounting to millions of dollars were settled, were ratified and put into effect by President Castro in virtue of dictatorial powers. Likewise, the agreement between the United States and the Dominican Republic of January 31, 1903, for the settlement of the claims of the San Domingo Improvement Company and its allied companies, was executed and put into effect by President Vasquez, in the exercise of similar powers. From May 2, 1902, till July 20, 1903, there was no congress, the constitutional guarantees being in suspense and all powers being exercised by the presi-

[1] Foreign Relations, 1895, part ii, pp. 1162, 1163, 1166, 1170, 1171, 1176.

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dent. In such cases the only authority in existence is necessarily dealt with, it being inadmissible to hold that the national powers and responsibilities are in abeyance and cannot be discharged because powers ordinarily exercised by one department of the government have for the time being been assumed by another.

(3) *Arbitrations under executive agreements*

Not only is the power of the president to settle the claims of citizens of the United States against foreign governments firmly established, but he has repeatedly employed arbitration for the purpose. An eminent authority has observed that this "at first glance would seem to be an independent exercise of the treaty-making power," but that "in a strict sense" it "cannot be so regarded"; and it has therefore been placed among "certain acts of an international character, binding the government, which the president may perform without the interposition of the Senate."[1] The legal theory on which such settlements rest is simple. Arbitration is in such cases only one of the modes by which the president exercises his power to settle the claims of individuals against foreign governments. If, in the exercise of this power, differences arise which apparently cannot be directly solved, it is a natural and obvious thing to submit them to the judgment of impartial persons. As early as September 5, 1793, Mr. Jefferson, as secretary of state, when discussing with the British minister the question of losses sustained by vessels unlawfully captured within American jurisdiction, proposed as a provisional measure that the collector of customs of the particular district and the British consul, "or any other person you please," should "appoint persons to establish the value of the vessel and cargo."[2]

It would be a work of supererogation to attempt to cite all the cases in which the executive of the United States has settled individual claims against foreign governments without reference to the Senate, but the more important examples may

[1] John W. Foster, "The Treaty-Making Power," *Yale Law Journal*, December, 1901, vol. xi, pp. 77, 79.

[2] American State Papers, Foreign Relations, vol. i, pp. 174, 175.

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be given, including those in which the process of arbitration has been employed.

By a convention signed at Caracas on May 1, 1852, claims of citizens of the United States against Venezuela, growing out of the seizure of certain vessels, were settled for the sum of $90,000, with interest to date of payment. An agreement, concluded seven years later (January 14, 1859), for the settlement of claims of citizens of the United States on account of their expulsion from the Aves Islands, was submitted to the Senate, President Buchanan remarking that "usually" it was "not deemed necessary to consult the Senate in regard to similar instruments relating to private claims of small amount when the aggrieved parties are satisfied with their terms," but that it was thought advisable in the present instance on account of the instability of the Venezuelan government.[1] By a protocol signed at Washington on February 17, 1903, all claims of citizens of the United States against Venezuela, which had not been previously settled by diplomatic agreement, were submitted to a mixed commission. The claims, with interest, amounted to upwards of $81,000,000; the awards of the commission, with interest, to $436,450.70. In connection with this settlement the non-blockading powers concurred with the blockading powers, under agreements concluded by the latter with Venezuela on May 7, 1903, in submitting to The Hague tribunal the question whether the blockading powers had a right to the preferential payment of their claims.

In 1858, it was agreed by an exchange of notes between Mr. Reed, the American minister, and the Chinese authorities that a fund of 600,000 taels should be raised in China out of duties collected on American goods and bottoms at three treaty ports for the payment of American claims. This agreement Mr. Reed afterwards modified by concluding the convention of November 8, 1858. In 1884, the American minister arranged with the taotai of Swatow to refer to two of the foreign consuls at that port the claim of an American citizen, named Ashmore, for injuries to a fishery by native trespassers in 1872.[2]

[1] Executive Journal, vol. xi, p. 142.

[2] Moore, International Arbitrations, vol. ii, p. 1857.

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On May 4, 1864, the American minister in Salvador agreed with the government of that country for the arbitration of the claim of an American citizen, named Savage, against Salvador on account of losses in connection with the exportation of a quantity of gunpowder.[1] By a protocol, signed at Washington, December 19, 1901, the claims of the Salvador Commercial Company and other citizens of the United States, stockholders in the Salvadorian corporation styled "El Triunfo Company, limited," were submitted to a mixed commission composed of the chief justice of Canada, a citizen of the United States and a citizen of Salvador. An award was made in favor of the United States for $523,178.64.[2]

By a protocol, signed at Rio de Janeiro, March 14, 1870, it was agreed to submit to the British minister at Washington, as arbitrator, the claims of the owners of the American whaling ship "Canada" and her cargo against the government of Brazil because of losses incurred, as it was alleged, by the illegal interference of Brazilian officials with the master of the vessel when he was attempting to pull her off a reef. An award was rendered in favor of the United States for the sum of $100,740.04.[3] By another protocol, signed at Rio de Janeiro, September 6, 1902, the claim of the owners of an American vessel against the government of Brazil, for indemnity for damages inflicted on the vessel and her long boat by the firing of Brazilian soldiers and by her detention at Rio de Janeiro, was submitted to the arbitration of the minister of Sweden and Norway at Washington.

By an exchange of correspondence in 1870, it was left to arbitrators to assess the damages in the claim of the American steamer "Lloyd Aspinwall" against the government of Spain on account of the seizure and detention of the vessel by the Spanish authorities in Cuba. By a similar agreement in 1885, the claims growing out of the seizure of the American barque "Masonic" by the Spanish authorities at Manila was referred

[1] Moore, International Arbitrations, vol. ii, p. 1855.

[2] Foreign Relations, 1902, pp. 857, 861.

[3] Moore, International Arbitrations, vol. ii, pp. 1733–1747.

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to Baron Blanc, Italian minister at Madrid. But far more important than these was the agreement effected at Madrid by an exchange of notes on February 11–12, 1871, under which all claims of citizens of the United States against the government of Spain, for wrongs and injuries committed against their persons and property by the authorities of Spain in Cuba since the commencement of the insurrection in 1868, were submitted to a mixed commission, consisting of two arbitrators and an umpire. These claims involved questions of great international importance, including the validity of decrees of the Spanish government and of legal proceedings against both persons and property in Cuba. Questions analogous to those involved in the "Virginius" case eventually came before the commission, as well as many questions of nationality or citizenship. The commission remained in existence more than ten years. It adjourned December 27, 1882, and the last awards of the umpire were filed on February 22, 1883. The amount of the claims presented to the commission was more than $30,000,000, exclusive of interest. The total sum awarded was $1,293,450.55. Immediately after the conclusion of the agreement, Congress appropriated $15,000 for the United States' share of the expenses. Appropriations were thereafter regularly made for the same purpose, the whole amount contributed by the United States being $126,324.59.[1]

The seizure and detention of the American steamer "Montijo" in Colombia, in 1871, gave rise to claims against that government. These claims involved various important questions, including that of the liability of a government for the acts of insurgents. They were submitted to arbitration under a protocol signed at Bogota, August 17, 1874, and an award was rendered in favor of the United States.[2]

On several occasions claims against Hayti have been settled in a similar manner. The award of the arbitrator in the cases of Pelletier and Lazare under the protocol signed at Washington, May 28, 1884, was not enforced, because in the case of Pelletier the arbitrator misconstrued his power, and in the case

[1] Moore, International Arbitrations, vol. ii, pp. 1019–1053.

[2] *Ibid.* vol. ii, pp. 1426–1446.

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of Lazare, as it was alleged, he did not have the benefit of certain important evidence. By an exchange of correspondence at Port au Prince, in 1885, the American minister arranged for the adjustment by a mixed commission of claims of citizens of the United States against the government of Hayti growing out of riots at Port au Prince. The claims were of small amount.[1] In the case of C. A. Van Bokkelen, a citizen of the United States, against Hayti, growing out of his imprisonment and detention in violation of treaty rights, an award was rendered in favor of the United States under a protocol signed at Washington, on May 24, 1888, for the sum of $60,000.[2] The claim of certain citizens of the United States against the government of Hayti, on account of the seizure and sale of their goods, was adjusted in a similar manner under a protocol signed at Washington on October 18, 1899. The arbitrator, the Hon. William R. Day, rendered an award in favor of the claimant for $23,000.[3]

The claims of two American citizens, named Oberlander and Messenger, against the government of Mexico were disposed of by arbitration under a protocol signed on March 2, 1897, by Mr. Olney, secretary of state, and Mr. Romero, Mexican minister.[4] Under a protocol concluded on May 22, 1902, the claim of the Pious Fund of the Californias was referred to The Hague tribunal, which decided that Mexico should pay to the United States the sum of $1,420,682.67, and in each succeeding year in perpetuity the sum of $43,050.99, in money having legal currency in Mexico.[5]

Under a protocol signed at Washington, February 23, 1900, a claim of a citizen of the United States named May, against the government of Guatemala, for a debt alleged to be due him under certain railway construction contracts with that government and for damages caused by the Guatemalan civil and military authorities, was submitted to the British minister in Central America, who awarded the claimant $143,750.73.[6]

Claims against Nicaragua of small amount were submitted to

[1] Moore, International Arbitrations, vol. ii, p. 1859.
[2] *Ibid.* vol. ii, p. 1809.
[3] Foreign Relations, 1901, p. 276.
[4] *Ibid.* 1897, pp. 382–388.
[5] *Ibid.* 1902, appendix ii.
[6] *Ibid.* 1900, p. 674.

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arbitration under a protocol signed at Washington, on March 22, 1900.[1] So, by a protocol signed at Washington, on May 17, 1898, the claim of a citizen of the United States against Peru was referred to the chief justice of Canada. In 1897, the complaint of E. V. Kellett, United States vice-consul general in Siam, on account of an assault committed upon him by soldiers of that government, was disposed of by a joint commission.[2] In the same year the claim of a citizen of the United States against the Siamese government, growing out of breaches by the latter of an agreement for the working of the teak forests, was submitted, under a protocol signed at Bangkok, July 26, 1897, to the governor of the Straits Settlement, by whom an award was rendered in favor of the United States for $200,000 in gold.[3] Certain claims against Chile were directly settled by an agreement concluded on May 24, 1897. By an agreement with Russia, signed September 8, 1900, various claims for the detention of American sealing vessels by Russian cruisers were submitted to arbitration. The submission involved important questions as to marine jurisdiction.

One of the most interesting of the arbitrations of the United States, under executive agreements, is that relating to the Delagoa Bay railway, under a protocol between the United States, Great Britain and Portugal, signed at Berne on June 13, 1891. The railway was constructed under a concession originally granted to an American citizen named McMurdo. McMurdo transferred his concession to a Portuguese company, which was in turn financed by an English company. The taking possession of the railway by the Portuguese government in 1889 gave rise to interesting and complicated questions as to the rights of McMurdo as well as of the English investors. Both the United States and Great Britain intervened for the protection of the interests of their respective citizens, and, on the demand of the United States, which was supported by the British government, the case was referred to three Swiss jurists,

[1] Foreign Relations, 1900, p. 824.

[2] Moore, International Arbitrations, vol. ii, p, 1862.

[3] Foreign Relations, 1897, p. 479; Moore, International Arbitrations, vol. ii, p. 1908.

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who, in 1899, rendered an award in favor of the United States and Great Britain for the sum of $4,670,000.

On several occasions claims against the Dominican Republic have been settled under executive agreements. In 1898 an American engineer, acting under such an agreement, rendered an award in favor of the United States for $74,411.17, with interest at six per cent for two and a half years, on account of the seizure of the Ozama bridge by the Dominican government. On April 30, 1904, an award was made by arbitrators of the sum of $215,812, on account of arms, ammunition and other articles furnished by the firm of Sala & Company to the Dominican government while General Heureaux was president. The arbitral proceeding was conducted under a convention signed on April 28, 1902.

By a protocol signed at Santo Domingo City, January 31, 1903, provision was made for submitting to a mixed commission the question of the terms on which the Dominican government should pay the sum of $4,500,000, which that government had agreed to pay in consideration of the cession to it of all accounts, claims and properties of the San Domingo Improvement Company and its allied companies, including their rights in the railway from Puerto Plata to Santiago, and in settlement of all differences, as well as in consideration of the relinquishment by the Improvement Company of its right to collect the revenues at all the ports of the republic. The protocol expressly required the arbitrators to fix the mode in which the moneys to be paid under it should be collected. By the award rendered on July 14, 1904, it was decreed that the money should be paid in certain monthly instalments, and that, in case of default, it should be collected at certain Dominican ports by an agent to be appointed by the United States.

It thus appears that, if we include only the more formal settlements, there have been thirty-one cases in which claims against foreign governments have been settled by executive agreement, and that twenty-seven arbitrations have been held under such agreements as against nineteen under treaties, where the settlement embraced claims against the foreign government alone and not against the United States.

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In connection with the arbitration under the protocol with the Dominican Republic of January 31, 1903, it may be pointed out that on various occasions the customs or other specific revenues of foreign countries have been pledged for the payment of American claims.[1] Provision has also been made in certain cases for the direct collection of such revenues, in the event of the failure of the local government to make the stipulated payments; but, as the cases in which such an arrangement has been necessary have been comparatively infrequent, at any rate in the experience of the United States in such matters, it is proper to refer particularly to certain precedents in which the subject has been either discussed or practically dealt with.

In 1880, the Venezuelan government appealed to the United States for its interposition in difficulties which had arisen between Venezuela and France, because the former government had fallen into arrears in payments due to the latter on the settlement of claims against Venezuela effected in 1864. As it was represented that there was danger that France would institute a blockade of Venezuelan ports and take possession of the custom houses for the purpose of collecting the money, and as there were conflicting claims as to preference among foreign creditors, Venezuela proposed to deliver certain monthly sums to the government of the United States, which was to distribute the money among all the foreign creditors. Mr. Evarts, who was then secretary of state, intimated that the proposal would be favorably entertained if it should prove to be acceptable to all the creditor governments. Subsequently, no arrangement having been effected, Mr. Evarts's successor, Mr. Blaine, acting in the name of the president, instructed the American minister at Paris to suggest that the United States would place an agent in Caracas to receive such monthly sums from Venezuela as might be agreed upon and distribute them

[1] *E. g.*, conventions with China, November 8, 1858, and September 7, 1901; with Colombia, September 10, 1857, art. iii; with Costa Rica, July 2, 1860, art. iv; with Ecuador, November 25, 1862, art. iii; with Mexico, April 11, 1839, art. vi, and January 30, 1843, art. iv; with Peru, March 17, 1841, art. vi; with Venezuela, February 17, 1903, art. v.

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among the creditor nations, and that, in case the Venezuelan government should default for more than three months in the regular instalments, the agent appointed by the United States should be

> authorized to take charge of the custom houses at Laguayra and Puerto Cabello, and reserve from the monthly receipts a sufficient sum to pay the stipulated amounts, with ten per cent additional, handing over to the authorized agent of the Venezuelan government all the remainder collected.

It was, said Mr. Blaine, the judgment of the president that an arrangement of this kind would give all reasonable security to each of the creditor nations.[1] The French government afterwards arranged its differences directly with the Venezuelan government, and the proposal of the United States was not carried into effect.

An actual arrangement, to which the United States is a party, for the collection of moneys from a foreign government by means of the sequestration of custom duties, is that effected by the protocol between China and the allied powers, which was signed at Peking, September 7, 1901. By this protocol, China agreed to pay to the allied powers, one of which was the United States, an indemnity of 450,000,000 taels, to cover the claims of governments, companies or societies and private individuals. For the collection of this debt a commission of bankers was created on which each of the foreign powers is represented by a delegate, and specific revenues are assigned for the payment of the debt. These revenues embrace (1) the balance of the revenues of the imperial maritime customs (the foreign service under Sir Robert Hart), after payment of the amounts previously pledged as security for prior loans; (2) the revenues of the native customs, which are administered in the open ports by the imperial maritime customs; and (3) the total revenues of the salt gabelle, exclusive of the portion previously set aside for other foreign loans.

A still later example, which is specially interesting because it substantially carries out in Venezuela under another form

[1] Foreign Relations, 1881, pp. 1217–1218.

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the proposal made by the United States in 1881, is that of the settlement with Venezuela under the agreements signed at Washington in 1903, among which is the protocol between the United States and Venezuela of February 17 in that year. By article v of this protocol, following the stipulations made in the other agreement, it is provided that the Venezuelan government shall set apart in each month, for the payment of claims, thirty per cent of the customs revenues of Laguayra and Puerto Cabello, and that, in case of failure to carry out this stipulation, "Belgian officials shall be placed in charge of the customs of the two ports, and shall administer them until the liabilities of the Venezuelan government in respect of the above claims shall have been discharged." These precedents directly sustain the protocol with the Dominican Republic of January 31, 1903, and the award of the arbitrators thereunder.

7. *Executive enforcement of statutes and treaties*

In view of what has been set forth, it is evident that the position that the president can make no agreement with a foreign power, except in the form of a treaty approved by the Senate, cannot be maintained; and that, if he had consented to be deprived, by amendment of the arbitration treaties, of the right to agree to the submission of any question whatsoever thereunder except by means of a new treaty, he would have waived the exercise of a power which he has constantly used. If the Senate had amended the treaties by inserting, after the word "agreement," the words "or treaty," the issue would have been more correctly drawn; but it must in fairness be admitted that this would not have accomplished the Senate's object in assuring to itself an opportunity to exercise its judgment upon the propriety of executive action in each particular case. It should also, in fairness, be admitted that they go too far who assert that the Senate, in amending the treaties, committed an act that was not legally justifiable. The law of the constitution is not more to be found in the letter of that instrument than in the practice under it, and the Senate has from the foundation of the government exercised the power of amending treaties. It has constantly given its "advice and consent" in that form.

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The practical question to be considered, so far as arbitration is concerned, is whether a general treaty might not be put into such form that the Senate would approve it without requiring each case actually submitted to be made the subject of a new treaty, so that the formulation of the issue to be determined by arbitrators and of the periods within which they were to act might be treated merely as a matter of procedure to be carried out by the executive.

To assert, as an abstract proposition, that the Senate cannot, without abdicating its constitutional functions, approve a general arbitration treaty in such a form, would be to claim for it a more extensive supervision of executive action than is enjoyed by other parliamentary bodies which have a voice in the making of treaties. By article 8 of the constitutional law of France of July 16, 1875, it is provided that "treaties of peace and of commerce, treaties which involve the finances of the state, those relating to the persons and property of French citizens in foreign countries, shall become definitive only after having been voted by the two chambers."[1] The constitutions of other countries contain similar or analogous clauses. And yet the Anglo-French arbitration treaty, on which the American treaties were modelled, was approved by the French chambers; and it is believed that in no case was any parliamentary difficulty created in carrying into effect the other European treaties. Nothing therefore can be drawn from the constitutional law and practice of other countries to support the proposition that the Senate of the United States cannot legally approve any general arbitration treaty in such a form that it can be executed without making subsequent special treaties. The Hague convention, which was approved by the Senate, has so far been carried into effect by the president by special executive agreements, but the only questions so submitted have related to pecuniary claims against foreign governments.

It may be affirmed that in the execution of every law the executive is invested with more or less discretion, and in some

[1] Crandall, Treaties, Their Making and Enforcement, p. 178.

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cases the powers thus committed to him have been of a very sweeping character. For example, by the act of June 4, 1794, the president was authorized, during a certain period when Congress was not in session, to lay an embargo on ships in American ports, "whenever, in his opinion, public safety shall so require."[1] By the act of June 13, 1798, suspending commercial intercourse between the United States and France, the president was authorized to restore such intercourse in case France should, before the next session of Congress, "clearly disavow" and "refrain from aggressions, depredations and hostilities" which she had encouraged and maintained against the vessels and other property of American citizens, and should also acknowledge the claim of the United States to be considered as neutral in the then existing European war.[2] By the act of December 19, 1806, the president was authorized to suspend the operation of the non-importation act, "if in his judgment the public interest should require it."[3] Similar powers were conferred on the president by the non-intercourse acts of March 1, 1809, and May 1, 1810.[4] Power has also repeatedly been conferred upon the president to suspend the imposition of discriminating duties, in case he should be satisfied that the discriminating or countervailing duties of other foreign nations had been so modified as not to operate to the disadvantage of the United States.[5] By the act of March 23, 1879, the president was authorized to suspend the judicial functions of United States consuls in Egypt whenever he should receive satisfactory information that tribunals competent to render impartial justice had been organized there.[6] Under the act commonly known as the civil service law, wide discretionary powers were committed to the president. The validity of legislation of this character has repeatedly been affirmed, one of the later instances being the action of the supreme court of the United States in sustaining the constitutionality of section 3 of the tariff act of October 1, 1890, by which, as has heretofore been seen, the president was empowered to impose certain duties on

[1] 1 Statutes at Large, 372.
[2] 1 *ibid.* 565, 566.
[3] 2 *ibid.* 411.
[4] 2 *ibid.* 528, 605, 606.
[5] 3 *ibid.* 224; 4 *ibid.* 3.
[6] 18 *ibid.* 23; 19 *ibid.* 662.

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various articles imported from foreign countries in case he should be of opinion that the duties charged in such countries on products of the United States were "reciprocally unequal and unreasonable."[1] It was contended that this section was unconstitutional, as delegating to the president both legislative and treaty-making powers. The court, after an exhaustive examination of the subject, decided that the section was constitutional, holding that it merely made the president the "agent of the law-making department to ascertain and declare the event upon which the expressed will was to take effect." It is true that the court in another place spoke of the imposition of duties being required when the president ascertained the existence of a "particular fact;" but it is obvious that under the statute the so-called "fact" was the declaration by the president of the opinion that, in his judgment, the duties imposed were "reciprocally unequal and unreasonable." The unconstitutionality of an act of Congress is a fact, after the court has announced it; but prior to such announcement the question whether the act is unconstitutional involves not the ascertainment of a fact but the exercise of judgment. In no other sense was the president's declaration that certain duties were "reciprocally unequal and unreasonable" the declaration of a fact.

JOHN BASSETT MOORE.

[1] 26 Statutes at Large, 567.

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CONTESTED CONGRESSIONAL ELECTIONS

THE exclusive right of the House of Representatives to judge "the elections, returns and qualifications of its own members" is an interesting survival of an idea which has been discarded by the parent who originated it. The child, however, who inherited the idea still clings to it, possibly not so much because of any firm conviction of its value as because of a constitutional provision that cannot easily be brushed aside. Whatever may be the reasons for the retention of this parliamentary privilege, certainly the conditions which caused the original promulgation of the principle in England no longer prevail, either there or in the United States. As need hardly be explained, the control by the legislature of the election of its own members originated as a defense against executive encroachments. It was during the reign of Elizabeth that the Commons began strenuously to insist upon the right of judging the returns and qualifications of their own members; and it was during the reign of James I, in the famous "Bucks" election contest, that the final struggle occurred between Crown and Commons over this important subject. The Commons, of course, won, and, in the words of Hallam, "no attempt was ever afterward made to dispute their exclusive jurisdiction"[1] until they themselves disputed and, in 1868, practically surrendered it. This privilege of ultimately deciding their own elections the Commons seem to have claimed with a determination as strong as that displayed in the struggle for free speech and freedom from arrest, and it came to be regarded, to a degree perhaps disproportionate to its relative importance, as among the most inviolable of parliamentary privileges. But although England has outgrown the conviction, the United States apparently has not.

When representative institutions developed on this side of the Atlantic, the colonists naturally claimed for their assemblies the

[1] Hallam, Constitutional History of England (New York, 1847), p. 176.

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same privileges which the House of Commons enjoyed. It may indeed be said that in this country the claim began with representative government, for when the famous Virginia assembly met in 1619, the House of Burgesses assumed jurisdiction over the contested election of one Captain Ward, to whom, as the record quaintly informs us,

> the Speaker tooke exception as at one that without any commission or authority had seated himselfe either upon the Companies, and then his plantation would not be lawful, or on Captain Martin's lande, and so he was but a limbe or member of him, and there could be but two Burgesses for all.[1]

Nor were the colonists of Massachusetts Bay slow to assume the same authority, for as early as March, 1635, we read in the records of that colony:

> It is ordered that when the deputies of several towns are met together before any General Court, it shall be lawful for them, or the major part of them, to hear and determine any difference that may arise about the election of any of their members.[2]

In nearly every state constitution[3] adopted prior to the meeting of the Federal Convention, the principle, as we should naturally expect, is clearly recognized; and in the Federal Convention itself, although the exact extent to which Congress might control the details of congressional elections was a matter of considerable debate, it seems not even to have been questioned that the House of Representatives should ultimately be the judge of the election of its own members.[4] The idea that the House should possess this important privilege was thus accepted as a matter of course and accepted with the original conception of its justification. To have allowed the courts, whose officers were directly or indirectly appointed by the

[1] Colonial Records of Virginia (Richmond, 1874), p. 11.

[2] Records of Massachusetts, vol. i, p. 142.

[3] The constitutions of Georgia and Virginia alone contain no specific recognition of the principle.

[4] The clause conferring this power was adopted "*nem. con.*" Elliot's Debates (Philadelphia, 1881), vol. v, p. 406.

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crown, to decide contested elections in the colonial assemblies would have invited executive interference, and when the ex-colonists made the House of Representatives the judge of its own elections, they, with little doubt, did so in the spirit of the old fear. But in the United States, with an elected executive and a judiciary whose independence is guaranteed by life-appointment, the old danger of executive encroachment which justified the privilege in the reign of James I and in the American colonial period has vanished. To-day it is simply a contest between two parties for political influence and the rewards of office, or sometimes a contest between the majority in the House and a constituency of the minority party.

The present method of procedure in contested election cases in the House of Representatives is based upon the law of 1851 with subsequent amendments. The essential points, however, in the present system of procedure may be traced as far back as the law of 1798, the first general statute which Congress passed to regulate the trial of these cases. Since the early historical development of the procedure in cases of contested elections has already been sketched in a paper read before the American Social Science Association in 1869,[1] this part of the subject may be dismissed with a brief summary. The first Congress which met under the new constitution was not without its contested-election troubles and among the rules adopted was one providing for the appointment of a committee of elections,[2] historically one of the oldest standing committees of the House.

Contrary to present practice, the elections committee at first simply reported the evidence to the House, which, with a scrupulous, supersensitive regard for its constitutional duty as a judge, proceeded itself to "examine the evidence and vouchers," [3] but this supersensitiveness almost immediately evapor-

[1] H. L. Dawes, "Mode of Procedure in Cases of Contested Elections," *Journal of Social Science*, 1870, pp. 56–68.

[2] Annals of Congress, April 13, 1789, vol. i, p. 122. This first committee, however, was elected by ballot of the House.

[3] Ramsay *v.* Smith, first Congress; Clarke and Hall, Cases of Contested Elections, 1789–1834, pp. 23–37. There was published recently (1901, House Doc. 510, 56th

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ated and the House was content to allow the committee to sift the evidence and report the facts.[1] For about nine years the House continued to decide contested elections with an irregular, shifting mode of procedure, but finally, in 1798, after several ineffectual attempts to devise a remedy[2] the first law establishing a general method of procedure was passed.[3] This law, however, expired in 1804, and for nearly half a century the House chose to proceed without the restriction of any general law and with little regard to precedent. Until 1834 when the first digest of cases was published, it was in fact quite impossible to know what the precedents were; it was a period without law, when each Congress in the determination of these cases did what seemed best in its own eyes. Frequent and protracted delays in the trial of cases were inevitable, for not until a Congress had met and an elections committee had been appointed could anything be done. There was no preliminary collection of evidence, such as is made to-day; and consequently the committee on elections had to spend weeks and months of valuable time upon work which might have been accomplished in the year or more intervening between the election and the meeting of the new Congress, not to mention the total loss of important testimony frequently caused by the delay. In the latter part of this period, in the twenty-sixth Congress, occurred the well known New Jersey case which caused such a bitter partisan conflict.[4] A member debating the bill of 1851 set

Congress, 2d Session) a digest, prepared by C. H. Rowell, of the cases from the first Congress to the fifty-sixth. This is a decided improvement upon the earlier compilations, which are of varying degrees of perfection or rather of imperfection. The earlier compilations include: Clarke and Hall, 1st–23d Congresses; Bartlett, 24th–38th, 2 Bartlett, 39th–41st; Smith, 42d–44th; Ellsworth, 45th, 46th; 2 Ellsworth, 47th; Mobley, 48th–50th; Rowell, 51st; Stofer, 52d.

[1] On the very next case, for example, the committee was instructed to report the facts; N. J. Members, 1st Congress, Clarke and Hall, Cases, 38–44.

[2] *E. g.*, 1791, 1796, 1797.

[3] 1 U. S. Statutes at Large, 537; 1798, chap. viii.

[4] "This is the first case in which the charge, now so common, that the majority of the committee were controlled in their determination by partisan considerations was solemnly and directly made by a minority of the committee in a report to the House." Rowell, Digest, 1789–1901, pp. 109–112. Although politically very important, this New Jersey case did not establish any very important precedents. *Cf.* McCrary, American Law of Elections, p. 236.

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forth, probably with little exaggeration, the evils existing during these years:

> This thing of contesting the right to a seat upon this floor has become the greatest of all humbugs in this age of humbugs. A man comes here and claims that he is entitled to the seat of the person holding it under the proper authority of the state. The consequence is that, during a long nine months' session, the member retains his seat, but at the close of the session the House decides that he is not entitled to it and he is turned out, after having exercised the functions of an office to which he had not been entitled, and both the contestant and sitting member are paid full wages of members of Congress.[1]

Eventually in 1851, after fifty years of chaotic irregularity, Congress passed a law that again introduced some uniformity into the method of procedure, and which, with subsequent changes, still regulates the trial of contested elections in the House. The chief purpose of the law was to expedite the taking of testimony, and thus to make it possible that cases should be more speedily decided. To contest an election, the contestant must, within thirty days after the result of the election has been declared, serve notice upon the member whose seat he claims, specifying the "grounds upon which he relies in the contest;" within thirty days after receiving this notice, the returned member must file an answer admitting or denying the facts stated in the notice and likewise stating "specifically any other grounds upon which he rests the validity of his election." Thus within sixty days after an election, the issue was to be clearly drawn and the gathering of testimony was to commence. The act contained more or less detailed regulations as to the manner in which testimony should be taken: the third section, for example, provided that any federal, state or local judge, upon the request of either party to the contest, should subpœna witnesses; the seventh required the magistrate to have this testimony reduced to writing and to transmit it to the clerk of the House of Representatives. The testimony was to be confined to the matters stated in the notice and answer, and was all to be taken within sixty days after the service of the answer

[1] *Congressional Globe*, 31st Congress, 2d Session, vol. xxiii, p. 109.

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by the contestee.[1] These regulations saved weeks of valuable time and introduced into the method of procedure at least a semblance of uniformity.

The rules laid down by the act of 1851 remained in force without change for about twenty-two years, when Mr. McCrary, of Iowa, the author of the well-known manual on the *Law of Elections*, at that time chairman of the committee on elections, secured the adoption of several amendments designed to improve the practical working of the law.[2] The sixty days allowed for taking testimony having been found too brief, the time was extended to ninety days,[3] and somewhat more definite and detailed provisions were made as to how the testimony should be taken.[4] The legislation of Congress regulating the expense of the contests is interesting and somewhat amusing. The Congress of 1873, after making in its sundry civil bill an appropriation of fifty thousand dollars for innocent "miscellaneous purposes" that evidently included the expenses of contestants and contestees, provided that after its own expiration Congress should no longer pay the expenses of election contests.[5] The next Congress, however, determined to be as generous to itself as other Congresses had been, simply disregarded this prohibition and proceeded as usual to pay the expenses of the parties, aggregating in some instances as much as three thousand dollars to each contestant and contestee.[6] Congress has since continued to make appropriations to parties involved in contested elections, with the restriction, as provided in the law of 1879, that such grants shall not exceed the amount

[1] 9 Statutes at Large, 568, 1851, chap. xi.

[2] There was little debate on these amendments either in the House or Senate. *Congressional Globe*, 42d Congress, 2d Session, part i, p. 396; part ii, p. 1161; 3d Session, part i, pp. 230, 306, 361, 495. 17 Statutes at Large, 408; 1873, chap. xxiv.

[3] Construed by act of March 2, 1875, to mean ninety days from date when answer is served on contestant. 18 Statutes at Large, 338; chap. cix.

[4] Contestant was to take testimony during the first forty days and the returned member during the next forty; contestant might take testimony in rebuttal during the remaining ten days. It was also specifically provided that testimony might be taken in two or more places at the same time.

[5] 17 Statutes at Large, 490; 1873, chap. ccxxvi.

[6] 18 *ibid.* 389; 1875, chap. cxxx.

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of two thousand dollars.[1] At one time Congress also directed that the name of a member whose seat was contested should not be placed upon the pay-roll until the contest was determined,[2] but this restriction remained in force but a short time.[3] Further changes, designed to expedite the consideration of cases, were made in 1887.[4] The existing law provided that the testimony must be in the hands of the clerk of the House before the meeting of Congress; the amendments of 1887 provided also for the printing of the evidence and filing of the briefs before the meeting of Congress, and thus effected a further saving of time.[5]

By several statutes and a long series of precedents the method of procedure in the trial of contested elections is thus pretty definitely fixed. Yet, as need hardly we stated, since the Constitution makes each House absolutely and exclusively the judge of its own elections, any House may at any time constitutionally disregard both law and precedent; and the most that can be said for the laws regulating the procedure is that they will not be disregarded "without good cause."[6] Both in earlier and in more recent years it has been repeatedly admitted in congressional debates and demonstrated in actual practice, that the House is absolutely free in this matter. A few examples may be given to illustrate what form the deviations from established law are likely to take. It has happened with some frequency, for instance, that the House has extended or limited the statutory time for the taking of testimony. In

[1] 20 Statutes at Large, 400; 1879, chap. clxxxii.

[2] Revised Statutes, 1878, sec. 38.

[3] 18 Statutes at Large, 389; 1875, chap. cxxx.

[4] 24 *ibid.* 445; 1887, chap. cccxviii.

[5] These amendments aroused but little debate. For report of committee, see *Congressional Record*, vol. xvii, part iv, p. 3517.

[6] Jones *v.* Shelly, 47th Congress, Rowell, Digest, 1789–1901, p. 395. A recent assertion of the exclusive jurisdiction of each House is found in the report of elections committee, no. 2, in the 57th Congress. *Congressional Record*, vol. xxxvi, p. 230. "We have no hesitation in saying that there is no statute which can fetter this House in the exercise of the high privilege and important duty devolved upon it by the constitutional declaration that 'each House shall be the judge of the elections, returns and qualifications of its own members.'"

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the case of Page *v.* Pirce in the forty-ninth Congress, the notice and answer had been duly given, but the contestant had failed to take testimony within the prescribed ninety days, alleging a verbal agreement with the contestee "that testimony might be taken at any time before the beginning of the session of Congress." The contestee, denying the existence of the agreement, had refused to attend the hearings to cross-examine witnesses, but Congress directed that the time for taking testimony should be extended so that the case might be investigated.[1] In the fifty-seventh Congress, contrary to the argument of the contestee that the House had no right to disregard the statute, the time allowed for the taking of testimony was shortened in order that the case might be decided before the adjournment of Congress.[2] In the fifty-first Congress, by order of the House, the chairman of the elections committee appointed a sub-committee of five to proceed to Arkansas to investigate a contest.[3] Ordinarily, all cases of disputed elections and controversies regarding seats are referred to the elections committee, but in extraordinary cases special committees may be appointed, as was done in the recent Roberts case.[4] But after all, these departures from the statutory regulations are not numerous, and whatever may have been the tendencies in earlier years, at present only most urgent reasons seem to cause a deviation.

The vital problem in connection with contested elections in the House of Representatives relates, of course, to the question of partisanship in the decisions, and in the consideration of this problem the remarkable increase in the number of seats contested during the last half-century must be regarded as sig-

[1] Page *v.* Pirce, 49th Congress; Rowell, Digest, 1789–1901, pp. 419–421. *Cf.* the case of O'Hara *v.* Kitchin, 46th Congress, in which request to extend time was refused, *ibid.* pp. 348, 349.

[2] Wagner *v.* Butler, 57th Congress, *Congressional Record*, vol. xxxvi, pp. 230–245. See especially the remarks of Mr. Olmstead. Other cases in point are the following: McCabe *v.* Orth, 46th Congress, Rowell, Digest, 1789–1901, p. 342; Jones *v.* Shelly, 47th Congress, *ibid.* p. 394; Benoit *v.* Boatner (2d case), 54th Congress, *ibid.* pp. 526, 527.

[3] Clayton *v.* Breckenridge, 51st Congress, *ibid.* pp. 679–681.

[4] *Ibid.* pp. 582–596.

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nificant. Roughly speaking, three times as many seats have been contested during the last fifty years as were contested during the preceding sixty-five years. The following table, showing the number of disputed seats in each House since the organization of the government, will be found instructive.[1]

Congress	Seats Contested	Congress	Seats Contested
1, 1789–1791	5	30, 1847–1849	2
2, 1791–1793	2	31, 1849–1851	6
3, 1793–1795	5	32, 1851–1853	1
4, 1795–1797	6	33, 1853–1855	1
5, 1797–1799	1	34, 1855–1857	9
6, 1799–1801	0	35, 1857–1859	7
7, 1801–1803	3	36, 1859–1861	7
8, 1803–1805	4	37, 1861–1863	21
9, 1805–1807	2	38, 1863–1865	22
10, 1807–1809	3	39, 1865–1867	8
11, 1809–1811	2	40, 1867–1869	17
12, 1811–1813	1	41, 1869–1871	29
13, 1813–1815	6	42, 1871–1873	19
14, 1815–1817	4	43, 1873–1875	11
15, 1817–1819	3	44, 1875–1877	10
16, 1819–1821	2	45, 1877–1879	7
17, 1821–1823	3	46, 1879–1881	12
18, 1823–1825	4	47, 1881–1883	20
19, 1825–1827	3	48, 1883–1885	14
20, 1827–1829	0	49, 1885–1887	10
21, 1829–1831	4	50, 1887–1889	8
22, 1831–1833	2	51, 1889–1891	17
23, 1833–1835	2	52, 1891–1893	6
24, 1835–1837	1	53, 1893–1895	10
25, 1837–1839	3	54, 1895–1897	38
26, 1839–1841	6	55, 1897–1899	16
27, 1841–1843	2	56, 1899–1901	9
28, 1843–1845	24[2]	57, 1901–1903	10
29, 1845–1847	5	58, 1903–	12

[1] Comparison of this table with the number of contests reported in Rowell's Digest will show some divergence. This is occasioned by the fact that Rowell reports cases, while this table represents the number of seats contested. Usually the two agree; but in Rowell a second attack upon the same seat in the same Congress figures as a second case, while a contest for a number of seats may appear as a single case.

[2] The large number of seats contested in the 28th Congress was exceptional; these were really not contests in the ordinary sense of the term. Congress had passed a law calling for the election of representatives by districts, but the states of New Hampshire, Georgia, Mississippi and Missouri had failed to obey the law, and the question therefore came up whether their representatives should be admitted. This question accounts for 22 of the 24 disputed seats. It is to be noted that the members elected by those states were not excluded.

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It will be observed that prior to 1855 no Congress (excepting the twenty-eighth, in which most of the cases were not contests in the ordinary sense of the term) had more than six cases; in two Congresses there were no contests whatever, and the occasions when only one or two seats were contested were frequent.[1] Since 1855, however, no Congress has had less than six, and one has had more than six times six. The average number of cases for each Congress prior to 1855 was about 3.54; since then the average has been 13.92, nearly four times as great. The progressive increase is made equally clear by a different comparison, by the fact that there have been more cases in the past thirty-five years than in the preceding eighty years.[2]

This large increase in the number of cases threatened to make serious inroads upon the time of the House, and the elections committee, with the thousands of pages of written testimony[3] that had to be read, the oral arguments of the contesting parties that had to be heard, not to mention its own deliberations, found itself overburdened. Unless changes in the procedure of the House itself were made to expedite the consideration of the increasingly large number of cases, it would be manifestly absurd even to pretend to make a fair examination of the merits of the contests. An early and natural expedient was to increase the size of the committee.[4] In 1869, when an unusually large number of cases threatened to add to the burden under which the elections committee was already staggering, the House authorized the chairman of the committee to appoint sub-committees of three members

[1] *E. g.*, five Congresses in which there was only case; eight in which there were only two.

[2] 1789–1869, 209 contests; 1869–1904, 258 contests.

[3] In 30 of the 38 cases that arose in the 54th Congress there were 15,627 pages of printed testimony. *Congressional Record*, vol. xxviii, part 1, pp. 7, 209.

[4] From the 1st to the 22d Congresses, inclusive, with the exception of the 21st, the committee contained seven members; from the 23d to the 42d, inclusive, with the exception of the 41st, nine members; in the 43d and 45th, eleven members; in the 44th, twelve members; from the 46th to the 53d, inclusive, fifteen members; from the 54th Congress to the present, three committees of nine members each.

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each, whose report should be made directly to the House.[1] The practical effect of this expedient was, of course, to turn the one committee of fifteen into five separate committees, so that contests were practically decided by small committees of only three members. The speed of the committee may thus have been multiplied by five, but it may be doubted whether the previous standard of justice and fairness in the trial of cases was maintained. The succeeding Congress, with a small number of cases on its hands, abandoned this expedient; and for about a quarter of a century, although on several occasions there were numerous contests, the House managed to get along with its one committee of nine to fifteen members. When, however, in the fifty-fourth Congress over thirty cases loomed up for consideration, something again had to be done to relieve the pressure on the committee; and accordingly, upon the motion of Mr. Cannon, of Illinois, instead of one committee, three were appointed,[2] an arrangement which has since been retained, although the number of contests has not again approached the high-water mark of 1895–1897.

How shall we explain the increasingly large number of contested elections in the House of Representatives? It the first place, it must be recognized that there exist circumstances, which not only extenuate but justify an increase. Other things being equal, we ought to expect more contested elections in a House of three hundred and ninety members than in a House of sixty-five members. Furthermore, some allowance must be made for the abnormal conditions created in the South by civil war conditions, which in more than one instance led to contests involving all the seats from a state.[3] Such cases can scarcely be classified as ordinary party contests for seats. Nevertheless, all due allowance being made for such and other natural causes, the increase still remains abnormally large. A larger number of voters and a larger number of congressmen may explain a proportionate increase in the number of cases, but they

[1] *Congressional Globe*, 41st Congress, 2d Session, part ii, pp. 1108, 1268, 1439, 1440.

[2] *Congressional Record*, vol. xxviii, part i, p. 202.

[3] *E. g.*, Tennessee in 1869 and Georgia in 1871.

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do not explain the more than proportionate increase. In the period prior to 1855 the total number of contests was about two per cent of the total membership of the House, while during the last fifty years the contests were over four and one-half per cent of the membership.[1] The exceptional cases in more recent years which have been due to the "abnormal conditions" created by the war are counterbalanced by equally exceptional cases in the earlier period. For example, the digests of those earlier years include among the number of contests cases occasioned by the acceptance of another office by a member of the House; nor must the twenty-two exceptional cases of the twenty-eighth Congress be forgotten.

The question has frequently been asked whether this rather large increase in the number of contested seats is not due in great measure to the partisan character of the decisions. The existence of an element of partisanship in the decisions scarcely needs proof. The question is simply one of the extent of this partisanship and the possibility of lessening, if not of eradicating it, under some other system of adjudication. On the whole, it is surprising, not that there has been so much partisan unfairness in the trial of contested House elections, but that the partisanship has been no greater. The House, a partisan body, whose members are frequently swayed by violent party passions, inevitably, on occasions, will make partisanship and not justice the basis of its decisions on this as well as on other questions. To make possible some estimate of the extent to which the House allows itself to be influenced by party considerations, the following table has been prepared, attempting to show how far decisions since the Civil war have been in favor of the majority, and how far in favor of the minority.[2]

[1] These percentages are reckoned on the basis of the membership as fixed by the census apportionment. For the earlier period the exact percentage was 1.96 and for the later period, 4.6.

[2] The party affiliations of the persons concerned in these contests have been determined by the use of the Biographical Congressional Directory, 1774–1903 (Doc. 458, 57th Congress, 2d Session) and, where that has failed, of the Congressional Directories. The last column marked "difficult to classify" includes for the most part cases in which the House took no action. It seemed unwise to attempt to enumerate these as decisions in favor of the majority or minority, although in some instances the failure to act amounted practically to a decision. In the 47th Congress, it should be noted, the Republicans had only a plurality.

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Congress	Party in Majority	Decision for Majority	Decision for Minority	Seat Declared Vacant	Difficult to Classify
39, 1865–1867	Rep.	5	1	.....	2
40, 1867–1869	Rep.	9	2	3	3
41, 1869–1871	Rep.	13	4	8	4
42, 1871–1873	Rep.	5	12	1	1
43, 1873–1875	Rep.	6	3	.....	2
44, 1875–1877	Dem.	6	3	1	
45, 1877–1879	Dem.	5	.....	.....	2
46, 1879–1881	Dem.	3	5	.....	4
47, 1881–1883	Rep.	7	5	1	7
48, 1883–1885	Dem.	10	2	.....	2
49, 1885–1887	Dem.	1	2	1	6
50, 1887–1889	Dem.	5	2	.....	1
51, 1889–1891	Rep.	8	4	1	4
52, 1891–1893	Dem.	3	1	.....	2
53, 1893–1895	Dem.	6	.....	.....	4
54, 1895–1897	Rep.	10	25	2	1
55, 1897–1899	Rep.	6	8	.....	2
56, 1899–1901	Rep.	4	1	.....	4
57, 1901–1903	Rep.	4	3	1	2
58, 1903–	Rep.	4	4	.....	4
		120	88	19	57

It will be noted that the results of this statistical study apparently do not bear out the charges of extreme partisanship made against the present system. Out of a total number of contests amounting to two hundred eighty-four, less than one-half of the decisions were unqualifiedly in favor of the majority. If we leave out of account for the moment the seventy-six cases in the last two columns, only thirty-two decisions more were rendered in favor of the majority than of the minority, a fact apparently showing a certain degree of self-restraint. If an attempt were made to take some account of the figures in the last two columns, it is not believed that the general result would be materially changed, for although most of the cases in which the seat was declared vacant were virtual decisions in favor of the majority, at least more than half of the cases listed as "difficult to classify," including mostly those in which the House took no action, resulted advantageously to the minority.

Does the table then prove the charge of extreme partisanship unjustifiable? An affirmative answer cannot be given, for undoubtedly the table hides a considerable portion of the par-

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tisanship involved in the decisions. It must be remembered that, under a system which allows contestants to draw upon the government for their expenses, members of the majority party are encouraged to contest upon grounds frequently so slight as to make an adverse decision inevitable, and that a decision for the minority usually means no more than that a member of the minority, already returned to the House, is permitted to retain his seat. Possibly a truer test of the amount of partisanship in the decisions would be found in the number of times the majority has actually deprived itself of seats, as compared with the number of times it has compelled members of the minority to vacate their seats. Measured by this criterion, the decisions would seem to justify some of the most emphatic charges of partisanship. Although the majority may frequently refuse to give a seat to a contestant of its own party, it very rarely asks a member of its own party to give up a seat. In the period of thirty-nine years covered by the statistics just given, the majority deprived itself of seats only nine times, while it deprived the minority of seats eighty-two times.

To aid in a correct understanding of the problem, the testimony of members of Congress themselves will be useful, provided we exclude that class of testimony which consists only of party criminations and recriminations. The evils of the present system have frequently been exposed by the men who have had practical experience in the determination of disputed House elections. The late Henry L. Dawes, with a long experience as chairman of the elections committee, writing when there could have been no occasion for party prejudice, thus characterizes the partisan nature of the decisions:

> All traces of a judicial character in these proceedings are fast fading away, and the precedents are losing all sanction. Each case is coming to be a mere partisan struggle. At the dictates of party majorities, the committee must fight, not follow the law and the evidence; and he will best meet the expectations of his appointment who can put upon the record the best reasons for the course thus pursued. This tendency is so manifest to those in a position to observe that it has ceased to be questioned and is now but little resisted. There is no tyranny like that of majorities, and efforts in the past to resist them and to hold the

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judgments of a committee of elections up above the dirty pool of party politics have encountered such bitter and unsparing denunciation and such rebuke for treason to party fealty that they are not likely often to be repeated.[1]

From a man eight years at the head of the elections committee such words seem eloquent testimony to the evils of the system; they seem the wail of a chairman whose hands were tied behind his back by party dictation. Of course Mr. Dawes had in mind the conditions existing at the time when he wrote, and since 1869 the conditions have undoubtedly improved, but hardly less emphatic is the official opinion of two recent elections committees. In formal reports to both the fifty-third and fifty-fourth Congresses, the committee, using identical language, expressed the conviction that

> A most casual inspection of the workings of the present system of deciding election contests will show that it barely maintains the form of a judicial inquiry and that it is thoroughly tainted with the grossest partisanship. . . . When it is alleged that members of a minority do not generally contest seats, a striking tribute is paid to the partisanship of the present system.[2]

It is particularly to be noticed that these opinions were not partisan denunciations made in the heat of a debate, but deliberate convictions uttered under circumstances that add greatly to their force. They are in the nature of frank confessions of wrong-doing—an ex-Republican chairman confessing to a scientific society, a Republican committee twice officially confessing to a Republican Congress.

Certain proceedings in recent Congresses further suggest the

[1] *Journal of Social Science*, 1870, p. 64.

[2] Report from Elections Committee no. 3, Mr. McCall, chairman. House Report no. 2234, 54th Congress, 1st Session. This is in great part a quotation from a similar report in the preceding Congress. Mr. McCall has not changed his mind since that report was made, for he writes, August 5, 1904: "*My Dear Sir:* I beg to acknowledge the receipt of your favor of the 30th *ult.*, asking me whether the characterization, in a report of a committee of which I was chairman in the 54th Congress, concerning election cases still holds good. I think it does. I do not mean to say, by any means, that all cases are decided in a partisan way, but I think it is very rare that a close election case is decided upon judicial grounds."

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difficulty of maintaining a strictly fair judicial procedure in the consideration of the cases. In the fifty-first Congress, for example, whenever a certain case came up for decision, the members of the minority, with persistent regularity, arose and left the House to break the quorum.[1] Even if it be granted that the merits of the case justified extreme measures, it is hardly compatible with a dignified judicial procedure that the minority of the judges should run away to prevent the court from making a decision. Likewise in an earlier Congress, the forty-seventh, the minority resorted to filibustering tactics in order to prevent a decision on a contested election, and the majority had to amend the rules to make a decision possible.[2] When, in the fifty-fourth Congress, the present arrangement of three committees was proposed on behalf of the majority and was opposed by the minority, the objections advanced were plainly mere pretexts; as, for example, when members of the minority protested against the extravagance of paying three committee clerks instead of one.[3] The real reason for the opposition was, with little doubt, partisan. The purpose of the proposed change was to expedite the consideration of cases. Under the old arrangement of one committee, the numerous contests of that Congress could not possibly be disposed of with any semblance of judicial fairness before the end of the Congress; and failure to act would be of decided advantage to the contestees, most of whom of course belonged to the minority. The longer the delay, the longer would the sitting members remain in the House, and if the delay were only long enough some might never be removed. Nor would one, on the other hand, care to maintain that only a conscientious, unadulterated yearning for justice prompted the Republican majority to advocate the multiplication of election committees. The desire for justice was probably re-enforced by the opportunity to seat Republican contestants.[4]

[1] In the case of Miller *v.* Elliot, S. C.

[2] *Congressional Record*, vol. xiii, part 5, pp. 4304–4329.

[3] *Ibid.* vol. xxviii, part 1, p. 208.

[4] A reference to the table, however, will show that most of the cases were finally decided in favor of the minority.

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In the failure to be strictly just in the decision of contested elections, it may in general be assumed that one party has been as guilty as the other. As Mr. Cannon remarked in a recent Congress, in which his own party had a large majority: "I apprehend, if there have been abuses touching election cases, that honors are easy." [1] The Republicans, having been in power longer, have had more opportunity to be guilty of "abuses"; but a reference to the table on a previous page will demonstrate that the Democrats have made proportional misuse of their more limited opportunities.

If evils are conceded to in the present system, the question of a remedy naturally arises. The solution which England has made of the problem is frequently pointed to us as an object lesson for the United States. We inherited the evil from England, why not also copy from her the remedy? The manner in which England has solved the problem is well known and need not be described in detail. After long endurance of evils transcending those existing in the House of Representatives—for things had come to such a pass in England that ministers resigned upon an adverse vote in a contested election case—Parliament has handed over this important function to the courts. Contested elections are tried before two justices of the king's bench division of the high court of justice.[2] The judges send a formal notice of their decision to the speaker; and although the House may nominally disregard the recommendation of the court, the notice from the judges is really "final to all intents and purposes." This system, established by the reform of 1868, has justified itself.[3] Some defects have

[1] *Congressional Record*, vol. xxviii, part 1, p. 203.

[2] 31 and 32 Vict., chap. 125.

[3] Mr. James Bryce writes, August 10, 1904, regarding the practical working of this law: "Dear Sir: On the whole the act of 1868, which transferred jurisdiction in election cases from committees of the House of Commons to the judicial bench has worked well; there is at any rate no demand for a return to the old system. The decisions of the judges have not always been consistent and sometimes have been generally thought to be mistaken; sometimes they are too technical in annulling an election for some small breach of the law, sometimes they fail to annul it where there has been extensive corruption the specific instances of which it has been hard to prove. But under the old system, things were on the whole worse, decisions more uncertain, and sometimes affected by party spirit or believed to be." See also Porritt, Election Petition Trials in England, *Green Bag*, vol. ix, p. 231.

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been found in the law, but they relate rather to minor details than to the general principle. The procedure provided for in the law of 1868 has been criticized on three grounds: (1) "the delay in the proceedings and protraction of the trial"; (2) "inevitable expense to parties irrespective of results"; (3) "inadequacy of existing arrangements to secure for the successful party the costs actually awarded."[1] In 1897 Parliament appointed a select committee to investigate the evils complained of and in the following year a report was brought in.[2] The committee recommended that the number of judges on the rota for the trial of election petitions should be increased and that several other changes should be made for the purpose of expediting the trials and reducing the expense connected with them; but it is noteworthy that the report embodied no suggestion of any fundamental change in the system.

It is worth while noting that under the English system the number of contested election cases is much smaller than under the American. In the ten years, 1894–1903, the House of Commons had only seventeen cases,[3] while our House in the same period had at least eighty-five cases on its hands, five times as many. It is true that elections are not so frequent in Great Britain as in America, but the membership of the British House is so much larger that the numerical comparison is not an unfair one. Is the advantage which Great Britain enjoys to be ascribed to a higher standard of political morality or to a better system and more stringent laws? A partial explanation is doubtless to be found in the different way in which the two countries deal with the matter of costs. While our government, on the assumption that the just determination of a contest is a public rather than a private advantage, pays the costs,[4] in Eng-

[1] British Blue Books, Report from the Select Committee on Election Petitions, 1898, vol. ix.

[2] *Ibid.* See also Parliamentary Debates, vol. xliv, p. 580; vol. lv, p. 623. A preliminary report was made in 1897, British Blue Books, Report from the Select Committee on Election Petitions, 1897, vol. xiii. The recommendations of the committee, contained in the final report of 1898, were not enacted into law.

[3] This figure was obtained by counting the reports made by the judges to the speaker, as found in the Parliamentary Debates.

[4] To the extent of $2,000.

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land the expense of the trial falls upon the unsuccessful party, as in any other suit at law. This regulation tends to keep down the number of cases in England, for, with the danger of being asked to pay the costs of the trial staring him in the face, a candidate will not contest a seat except upon good grounds. Furthermore, the whole subject of the trial of contested parliamentary elections must be viewed in the light of the much more stringent laws against bribery and corruption existing in England.

Why not apply the English method in the United States? The objections are several, the first and strongest being the familiar constitutional obstacle. The duty of judging its own elections, imposed upon the House by the federal constitution, cannot be delegated; and even if the House should succeed in evading this technical difficulty, it is doubtful whether the courts themselves, in view of past decisions, would consent to undertake a function which they might choose to regard as political rather than judicial. Without an amendment of the constitution it is obvious that the courts in this country cannot be made the final arbiters in contested congressional elections. The additional difficulty that each House is itself absolutely free and untrammelled in this matter has already been dwelt upon. Remains there nothing, then, which may be done within the constitutional provisions as they are?

In seeking an answer to this question, it will be of interest and value to note the suggestions of reform that have recently come from the House itself. It has been twice proposed, first in the fifty-third and again in the succeeding Congress, that the duty of determining who are the *prima facie* members of the House should be turned over to the federal courts. Such legislation would virtually make the federal judges the returning officers, in place of the governors or other returning officers existing in the several states. The committee recommended that the duty of issuing the certificates of election be taken away from the political officials of the states, "who have no special qualifications to decide judicial questions" and be conferred upon judicial tribunals.[1] This would, of course, involve

[1] House Report, no. 1669, part 1, 53d Congress, 3d Session; no. 2234, 54th Congress, 1st Session.

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no immediate change except in the method of determining who should be the members of the House for the purpose of its organization; but it was further proposed to accord to this preliminary judicial decision a strong moral and considerable practical influence upon the final decision of the House, by providing that the pleadings in the courts should "be substantially the notice of contest and answer thereto," and "that the same evidence shall be taken and used in the courts and in the ultimate contest in the House." The effect intended by such a regulation is obvious. The House would have to base its decision upon "precisely the same record that was passed upon by the courts;" and "while its power to reverse any decision made by the courts would be unquestioned, its members would hesitate to make a purely partisan decision and reverse a finding already made by a judicial tribunal."[1] But the bill met with vigorous opposition from the Democratic minority, who objected to it on grounds of both constitutionality and expediency. By quoting English precedents, the minority endeavored to demonstrate that to make the federal courts the judges even of the *prima facie* right to a seat would be an unconstitutional delegation of a power and duty conferred upon the House. They claimed that the bill violated the rights of the states; that it threatened the destruction of one of the boasted and fundamental principles of our government, the independence of the respective departments; and they feared that the measure would have a tendency to strengthen "the growing feeling of distrust" of the federal judiciary among the masses of the people.[2] These were the reasons publicly avowed by the minority to explain its opposition to the proposed reform; but again we cannot refrain from recalling a fact which must have appealed to the members of the minority, although they scarcely mentioned it. Most of the federal judges were Republicans, and since these hold life-appointments, the power

[1] Of course such a law could exist only so long as the House chose to obey it; but if such a system once became firmly established, it probably would not be easily changed or disregarded. However, the courts might refuse to bear this burden on the grounds previously noted.

[2] House Report, no. 1669, part 2, 53d Congress, 3d Session, vol. i.

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of deciding contested House elections was likely to remain in the hands of that party for an indefinite period. The chance of getting control of the House was of course greater than that of controlling the courts. The minority's fear of the judiciary, which was natural and perhaps not groundless, illustrates how partisan considerations constantly stand in the way of reform. The Republican majority on its part was evidently apathetic, for notwithstanding the two successive recommendations from its committees nothing was done.

It has also been proposed to impose a special oath upon members of the election committees to decide cases "according to the law and evidence, with the understanding that ordinarily their verdict would settle the case"[1]—a mild reform that would presumably do little to change the present practice.

Thus far, then, all plans to change the system of deciding contested elections in the House of Representatives have not only failed, but have been received with general indifference and apathy. A "constitutional" prejudice is not easily shaken off. It should be added that some members, whose opinions undoubtedly deserve great respect, while admitting the existence of abuses believe that the present system is on the whole the best. Mr. James R. Mann, who is at present chairman of one of the election committees and has had several terms of experience in the House, is "inclined to believe," for example, "that the present method of settling contested election cases is the only practical method which can be adopted," and he questions whether the "ratio of justice" would be greater under any other system.[2] It must be admitted that noticeable par-

[1] Representative McCall, in a letter dated August 5, 1904. See also *Congressional Record*, vol. xxviii, p. 217.

[2] He writes further, under date of August 12, 1904: "I believe I can say confidently that during the four terms that I have been in Congress no Democrat has been unseated because he was a Democrat, the majority of the House during that entire time being Republican. My own judgment is that as a rule partisanship will have less effect upon the members of the legislative than it would have upon the members of the judiciary if the same questions were presented before the bench. . . . A contested election case is necessarily a somewhat summary proceeding. It cannot await the slow process of legal procedure in court even if it could be fairly determined there."

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tisanship in the decisions appears just at present to be relatively infrequent. Under normal conditions, cases may continue to be decided, on the whole, equitably. The hundred and fifteen years of precedents and the recent publication of these precedents in a convenient digest tend constantly to counteract arbitrary procedure and injustice. But the tide of partisanship may rise again; and when some flagrant departure from justice, perhaps in a close contest involving the control of the House, draws attention to the evils lurking in the system, public interest will again be aroused.

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DIRECT LEGISLATION

AND ITS PROSPECTS IN THE UNITED STATES

IN the course of his inaugural address to the legislature of Massachusetts in January, Governor Douglas, the newly-elected Democratic governor of an admittedly Republican state, made certain suggestions for legislation which are of national interest. He stated it to be his opinion that Massachusetts industries are suffering from the present protective tariff, and he urged the legislature to appoint a commission to consider the effect of the tariff upon the prosperity of the commonwealth. He then suggested that the commission "should consider the advisability of a referendum vote on one or more of its conclusions, the primary object of such vote being to obtain an expression of opinion from the people for the information and guidance of our representatives in the Congress." The widespread sympathy which greeted this proposition demonstrated how deeply the sentiment in favor of a more active participation by the people in law making has manifested itself in the United States.

It is now ten years since the demand first began to be heard, from various parts of the nation, that a voter's franchise should not be confined to making a selection among candidates for public office, but should also include an opportunity to pass judgment upon questions of legislative policy and to approve or veto legislative enactments by voting for or against their confirmation. This desire for the so-called initiative and referendum is due in part to descriptions of the successful government of Switzerland by direct legislation, in part to a growing distrust of our representative system of government, as illustrated by our state legislatures and city councils, and in part to the labor unions. The workingmen have seen that if laws are to be enacted by the submission of measures to the voters at the polls, their organizations will give them opportunities for

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concerted action, and they may become an important factor in political life. It has found expression in magazine articles and books upon the referendum, in "direct legislation leagues," and in amendments to the constitutions of Utah, South Dakota Oregon and Missouri. It is apparently not too much to say that the great majority of political reformers turn to direct legislation in some form as a necessary part of their programmes. The present governor of Massachusetts, for example, followed up the suggestion in his inaugural address, which is quoted above, with a recommendation for legislation which would permit the people of the state to veto or approve not only the statutes passed by the legislature, but also all actions of the city councils in the various municipalities.

Though the subject is one which is familiar to all students of government and to the members of most legislative bodies, the arguments for and against direct legislation and the debates upon bills affecting it have almost invariably been founded upon its theoretical appropriateness or inapplicability to the American system of government. It is true that attention is constantly called to the Swiss experiences with the initiative and referendum by those who endorse and also by those who oppose the principle of direct legislation, but it is generally admitted by both sides that the social and economic conditions of the Swiss cantons and the Swiss conception of popular government are so radically different from American life and government that the facts concerning the history of Switzerland can have only a general and theoretical bearing upon practical legislative problems in America.

The time-honored argument of the advocates of direct legislation in this country is Rousseau's text, that as the government is founded upon the acquiescence of the governed no principle can be wrong which brings law making closer to the people. The stereotyped reply of the conservative believer in representation is that direct participation by the people in legislation is inconsistent with the continued existence of the American principle of departments of government; that it would render the veto of the executive ineffective; that the function of the supreme court to pass upon the constitutionality

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of laws would be destroyed; that through it the whole trusted fabric of checks and balances would be distorted. The time seems now to have come, however, when the question of the further extension of direct legislation in America may be argued from actual experience—not the experience of foreign countries but the experience of American states which have adopted it in some form and whose citizens now directly participate in law making. What are the actual results which direct legislation has accomplished in the last ten years?

There are three forms, generally speaking, in which a legislative measure may come directly before a voter. It may come before him, in the first place, under the general provisions of the constitution of a state which has accepted the initiative and referendum as part of its regular legislative machinery. This is the way it would come to-day to a voter in Oregon. Secondly, it may come to him under an act of a legislature when the opinion of the people is desired upon a special proposition, as the governor of Massachusetts to-day desires the opinion of the people of that state on the tariff question. Thirdly, a voter may be asked whether he desires the provisions of a law already passed by the legislature to apply to the community in which he lives. Thus under the terms of a general law controlling the sale of liquor in cities and towns, a citizen may have the right to express on his ballot his opinion whether any liquor shall be sold in the municipality in which he lives. This local option is not, accurately speaking, direct legislation, for it is the application of the law to a certain place and not the enactment of a law which is before the voters. Inasmuch, however, as it involves the expression of opinion by the voter on a measure and not on a candidate, the lessons to be derived from this form of referendum are well worthy of consideration.

Are there then lessons to be learned from the experience of the states of Utah, South Dakota, Oregon and Missouri which have incorporated the initiative and referendum into their legislative machinery? The constitutional amendment of South Dakota, passed in 1897, is as follows:

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SECTION 2. The legislative power of the state shall be vested in a legislature, which shall consist of a senate and house of representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions).

Provided, That not more than five per centum of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

This section shall not be construed so as to deprive the legislature or any member thereof of the right to propose any measure. The veto power of the executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the state shall be, "Be it enacted by the people of South Dakota." The legislature shall make suitable provisions for carrying into effect the provisions of this section.

The amendment to the constitution of Utah passed in 1899 and that of Oregon passed in 1901 give to the citizens of those states the same general powers that are given to the voters of South Dakota, except that in Utah there may be no reference of a statute to the people "if it has been passed by a majority of two-thirds in both houses of the legislature"; and Oregon excepts from the operation of the referendum "laws necessary for the immediate preservation of the public peace, health and safety." The Missouri provision is practically similar. Strange as it may seem, the amendments appear to have had as yet little effect on legislation in any of the four states. In 1899 out of a total of 127 statutes passed by the legislature of South Dakota, 64 were passed under the emergency clause, in 1901, 81 out of a total of 186 acts, and in 1905, 85 out of 177 acts were so passed. To practically every matter of popular or political interest the emergency rider has been hitched. No acts have been submitted to the people. In Utah the legislature refused to pass the legislation necessary to carry the policy of the

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initiative and referendum into effect. The only result in Missouri is that this year many acts were passed under the "emergency clause." In Oregon the necessary law to carry out the initiative and referendum was enacted in 1903, and in June, 1904, a local option law was passed by a popular vote of 56,285 to 16,354 and a direct primary act by a vote of 43,316 to 40,198. Of the 99,315 persons who were present at the polls, 15,801 did not vote on the local option bill and 26,586 did not take sufficient interest to pass on the direct primary measure. It is an interesting coincidence that at the very time when the people of Oregon were passing their direct primary law, the people of Massachusetts were, as we shall see, petitioning the state legislature to find some method to repeal a direct primary law which during the previous year had been adopted by the voters of Massachusetts by a referendum vote.

The result apparently is that, in spite of the reservation to the public of the broadest possible powers compatible with public safety, the voters of three of these states either are satisfied that their legislators are doing their work properly or (what seems more probable) do not care to take the trouble to interfere or are powerless, with all the machinery of direct legislation in their hands, to restrain legislative action.

The history of general referenda on special propositions upon which the legislative body desires the opinion of the people gives more positive results. The example of this form of referendum which is most striking in the number of voters to whom a single question was addressed, and in the vastness of the territory to which it applied, is the case of the poll of all the voters of the Dominion of Canada in 1898 on the subject of prohibition. To the question: "Are you in favor of passing an act prohibiting the manufacture or sale of spirits, wine or beer within the limits of the Dominion of Canada?" the voter was to reply "yes" or "no" on the ballot. The legislature asked the question only in a consultative way, not binding itself to any course as a result of the vote. "This election," says Mr. Oberholtzer in his book, *The Referendum in America*, "cost the Dominion of Canada about $300,000, and although there was a small majority on the face of the returns in favor

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of prohibition, less than thirty per cent of those entitled to vote went to the polls." A Canadian correspondent wrote to the New York *Evening Post*, on the day after the election, as follows:

> In some cases half the electorate polled, but these were exceptions. From one-fourth to one-third was a more common proportion, and in some districts it fell as low as one-eighth. Many of those who did vote seemed to wander into the polling stations more by accident than by set purpose.[1]

An example of the expression of popular opinion upon a legislative problem of a rather different character occurred at nearly the same date in Massachusetts. At the time of the building of the Boston subway, the question arose in the legislature whether surface car tracks on Tremont Street, the street under which the subway was built, should be removed. The legislature submitted the question to the voters of the city at an election held December 12, 1899. The result of the vote was 26,166 in favor of retaining the tracks to 51,643 against it. 25,066 failed to vote. Seventy-five per cent of all the voters, therefore, expressed themselves on this question—a very substantial poll, which showed an active interest by the people of Boston in the question and gave a decisive answer to it.

But that such an interest in the legislative propositions which are put before them is not always taken by the people of Massachusetts at large appears from the following table of the votes cast in the last ten years upon proposed amendments to the state constitution:

[1] "At the city election in Chicago in April, 1904, the question of immediate municipal ownership of the street railways was voted on, under the Public Policy law. The affirmative vote was 121,957; negative, 50,807; the total vote cast being 236,000 out of a registration of 400,000. Yet on this vote the loud and persistent claim has since been made that the council should 'obey the will of the people' and proceed to acquire the street-railway properties, in the face of the absolute impossibility of its doing so on account of complex litigation and financial incapacity.

The Public Policy law is useless and mischievous. It is deceptive in its objects and results, and used as a weapon by agitators." W. H. Brown, *American Journal of Sociology*, May, 1905.

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Proposal	Yes	No	Not Voting
No person to be disqualified from voting because of a change of residence until after six months, *etc.* (art. xxx), Nov. 4, 1890..	97,177	44,686	235,837
Amendment of art. xxviii (art. xxxi), Nov. 4, 1890	100,109	27,021	250,570
So much of art. iii annulled as makes the payment of a poll-tax prerequisite for voting (art. xxxii), Nov. 3, 1891.....	144,931	53,554	195,749
A majority of each branch of the General Court to constitute a quorum, *etc.* (art. xxxiii), Nov. 3, 1891.....	152,688	29,590	211,956
Property qualification of governor annulled (art. xxxiv), Nov. 8, 1892	141,321	68,045	243,069
Clause relative to payment of traveling expenses of representatives annulled (art. xxxv), Nov. 7, 1893	125,375	80,855	248,525
So much of art. xix as is contained in the words "commissioners of insolvency" annulled (art. xxxvi), Nov. 6, 1894	114,499	34,741	304,961
Biennial elections (art. i), Nov. 3, 1896	115,505	161,263	219,833
Biennial elections (art. ii), Nov. 3, 1896	105,589	156,211	225,801

A conclusion from these examples seems to be that on matters of immediate and local interest voters will take the trouble to express themselves at the polls, but upon more general propositions they feel less interest and so little personal responsibility that usually less than a majority vote at all.

This tendency to vote upon questions which are familiar to the voter and to slight or neglect the problems which need thought or study is apparent in the third class of referenda—those cases in which the question is one of the application of a general law to a single municipality. Thus the question: "Shall licenses be issued for the sale of intoxicating liquors in this city or town?" is one upon which every citizen of Massachusetts passes each year. The question to many citizens presents a moral issue in addition to the business policy involved. We find consequently in the city of Cambridge that in 1903 out of 15,344 persons who voted at the city election all but 1,418 voted on the license question. In 1902 out of 14,053 who voted at the city election all but 1,142 expressed themselves on this subject. In Boston a larger percentage of voters pass upon the liquor license question than upon almost any other issue which comes before them except the choice of

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candidates. The local option law in Massachusetts may, therefore, be called an unqualified success.

As often, on the other hand, as a proposition is put to the voters of the commonwealth which involves a decision upon a subject with which they are not already familiar, the result is unsatisfactory in the extreme. A remarkable illustration of the incompetency of the voters at large in Massachusetts to grasp a new question, although it was a very simple one, occurred within the past year. An amendment to the constitution, not so sweeping as those in the four western states already mentioned but having in view the same general purposes, was approved by the legislature in 1903. By a provision of the Massachusetts constitution proposed amendments to it must be passed by two legislatures and must then be accepted by the people. This proposition for direct legislation came, therefore, before the legislature of 1904. Its friends confidently believed that it would pass the legislature a second time by an overwhelming vote. It probably would have done so had it not been blocked by an unexpected obstacle.

At the election just previous to the convening of the state legislature all voters, with the exception of the citizens of Boston, had found upon their ballots the question: "Shall an act passed by the general court in the year 1903, entitled 'An act to provide for joint caucuses or primaries of all political and municipal parties,' be accepted?" The reason for presenting this question to the people of the state was as follows. For some years there had been complaints from cities throughout the state that the caucuses of the various political parties were sources of corruption. It was said that the same men voted in the caucuses of two different parties. It was maintained that the old fashioned caucus was out of date in these days of modern political methods. A statute known as the "Luce law" had been passed, therefore, by the legislature of 1903. This statute provided that the caucuses of all parties should be held at the same time in the same room and should be presided over by the duly appointed election day officials. In formality and in cost the caucus was to be like an election. A voter was to come to it and vote at it just as if it were an election, except

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that he declared his political faith at the rail and received a ballot containing the names of those persons only who sought nomination from his party. It was felt by the legislature, however, that such a change in the method of choosing candidates for office ought not to be forced upon the voters of the state against their will. The new law involved an expense which was considerable for country towns, and it did away with the traditional methods of choosing candidates for political offices. Thus while the opportunity should be given to those communities which really needed that protection of publicity in the caucus which ordinarily accompanies an election, it was believed that those which were contented with the old system should be let alone. As the change affected all voters, as the reason for the new law was easy to understand and as a voter's political opinion or party was not expected to affect his decision, it seemed to be a peculiarly fit measure to submit to each community for acceptance or rejection by popular vote. To Boston alone the law was to apply whether the people wanted it or not. The provisions of the new law were accepted by 21 out of the 33 cities in the state and by 127 out of the 320 towns.

The morning after election the Luce act was hailed as the long-sought panacea for municipal corruption. A second glance at the record of votes cast, however, showed that the popular demand for the new law had been overestimated. In only a very few cases had half of the voters of the community cared to register themselves either for or against the proposition. In many cases not half of those voting for candidates voted upon this question. In Worcester, out of 36,247 registered voters, of whom 22,014 voted at the election, the law was adopted by a vote of 4921 to 4558. The following is a list of the vote of the ten largest cities and of twenty-five typical towns upon the question:

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	TOTAL REGISTERED VOTERS	VOTING AT THE ELECTION	VOTING ON LUCE ACT	
			YES	NO
BROCKTON	9,106	7,044	1,944	1,861
CAMBRIDGE	16,151	13,301	4,068	3,598
FALL RIVER	15,205	11,263	2,881	5,521
LAWRENCE	11,131	9,223	3,829	2,305
LOWELL	15,254	12,824	6,203	2,786
LYNN	13,894	10,762	4,389	2,240
NEW BEDFORD	9,317	7,207	2,409	1,769
SPRINGFIELD	11,771	8,237	3,609	2,007
SOMERVILLE	10,771	8,710	3,822	2,210
WORCESTER	36,247	22,014	4,921	4,558
ATHOL	1,585	1,309	277	333
BRAINTREE	1,791	1,388	213	387
CHESTER	296	185	43	29
DALTON	661	493	142	140
ENFIELD	228	154	56	34
FRAMINGHAM	2,586	1,955	551	459
GRAFTON	832	677	170	141
HARWICH	580	350	86	64
IPSWICH	932	703	151	195
LEXINGTON	900	684	211	179
MIDDLEBORO	1,499	977	328	188
NORTHBOROUGH	349	271	106	63
ORANGE	1,316	998	152	347
PETERSHAM	207	117	23	30
ROCKPORT	972	730	137	114
STOUGHTON	1,509	1,102	326	203
TISBURY	265	164	25	37
UXBRIDGE	740	632	214	174
WATERTOWN	1,933	1,572	571	371
YARMOUTH	431	330	86	39

Within a few weeks the smaller towns appreciated that, as one of their representatives at the next legislature put it, "they had drawn a gold brick." They found the law applied to the nomination of town officers, in the choice of whom there had never been charges of corruption. They found they had contracted to pay hundreds of dollars apiece for what to them were useless formalities. The legislature, just then convened, was flooded with petitions for the repeal of the law as far as it applied to towns. Sad tales of mistaken voters were told upon the floor of the House. One member stated it to be his belief that half of his townsmen who voted upon the question at all thought they were voting upon local option in the matter of the sale of liquor.

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The immediate result of this agitation was the passage of a statute providing that the Luce act should not apply to town caucuses unless the town at a future annual meeting voted in favor of it, and then should not apply to a caucus for town officers unless expressly provided for in the vote. In just two of the 127 towns which voted in 1904 to accept the Luce act is the law in force to-day.

The discontent, however, was not confined to the towns. Several cities found that the old method of choosing candidates was more satisfactory; seven of them have now, after giving the new law a year's trial, through the relief afforded by a new statute, reversed their former decision, and by vote of their citizens decided to return to their old familiar methods. It is said on very good authority that other cities did not dare to place the question whether their earlier vote should be reversed before their electors at the city election this year, because they feared that the people would mistake it for the question as to the sale of liquor and vote the wrong way.

In the midst of the debates in the legislature upon the repeal of the Luce act came the question of the constitutional amendment looking toward direct legislation. The halls of the legislature rang with oratory. Its members were told that in the people lay the source of all power and that in government directly by the people was to be found the safety of the nation. But upon the desks of the members were the petitions of towns for protection against their own short-sighted voters. The argument of practical experience was too strong to be resisted. The proposed amendment was easily defeated. The experiment in legislation by the people had admittedly failed.

What then are the conclusions which can be drawn from the history of direct legislation in this country? Clearly the referendum has its place in all political systems, but it is not the place which those who find in it a panacea for legislative evils would give to it. It is a prompt and decisive method of learning the opinion of the public upon a very simple specific question which comes very near to them and upon which they have a definite opinion before they hear that the question is to be put upon the ballot. Thus a manufacturing community in which

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trade union doctrines are familiar might be expected to express itself decisively on a question involving the closed or open shop. If the question asked obviously involves a moral issue, voters will keep their consciences clear by marking their ballots. It is conceivable that at some time a state might become inflamed upon some burning issue to which the legislature remained cold. This is unlikely, because it is the fault of most legislative bodies to follow over-promptly what they believe to be the desires of their constituents. If because of corruption in the legislature or for some other reason such a condition of affairs did happen to exist, a referendum might be a useful method of registering the true public opinion. A petitioner for the change in the Massachusetts constitution said to a committee of the Massachusetts House of Representatives: "Think of a great railroad lease being permitted in this state without the opportunity for the expression by the people upon it." There seems little chance to believe that such an expression would be a helpful one. It may be unfortunate, but it seems to be true, that in this country the average man feels he has done his duty to the state when he has passed upon the merits of two candidates, and he does not turn his mind into the channel of the consideration of particular public measures. As Mr. Lawrence Lowell puts it, an American citizen "is used to passing on men not on measures."

Though the referendum, therefore, may be a fitting instrument to protect the local self-government of municipalities and might conceivably in some great political crisis express the sovereign will of the people, it is not an effective method of creating legislation. The political reformer in a representative government who seeks through the referendum to find a short cut to political purity and ideal law making seems doomed to disappointment. Like many other short cuts it apparently leads into a forest of new complications. Improving a well trodden way is on the whole a more promising use of the practical reformer's energy than cutting new paths. Government by representation is a road that has brought this nation to the land of prosperity. The same reasons which led our forefathers to adopt it as the most satisfactory form of creating legislation

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exist to-day. We may think that it is a road which is beset with thorns and weeds and that weeding is not such interesting work as cutting into the forest, but it is a great satisfaction to know that we have a real road and that it is taking us somewhere. Practical political reformation of the representative system, participation at caucuses and primaries, and devoted, self-sacrificing efforts to elect wise and honest legislators are not inspiring labors but they are apparently the most important duties before the American citizen who cares for his country.

W. RODMAN PEABODY.

BOSTON, MASSACHUSETTS.

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THE COST OF LIFE INSURANCE

THE recently published evidence of the extravagance and misconduct of the officers and directors of the Equitable Life Assurance Society of the United States has aroused the interest of the general public and directed attention to the question of the proper organization and management of life insurance companies. That an examination of the affairs of other companies in the same business will reveal practices fully as reprehensible as any of which the officials of the Equitable are accused, is universally believed. There will undoubtedly be legislative investigations, and more or less wise laws will be enacted by different states for the purpose of promoting honesty and efficiency in the management of life insurance companies and safeguarding the interests of the insured. The only hope of permanent improvement, however, lies in the development of an intelligent interest in the matter on the part of intelligent people; and this interest must reach more fundamental questions than the relative merits of the mutual and the joint-stock forms of organization, or the proper restrictions on the investment of life insurance funds. It will be unfortunate if the present popular interest in the subject exhausts itself on these relatively superficial and subordinate phases of the matter, and fails to reach the most important questions of all: What is the proper cost of life insurance? Are we paying an excessive price for the services life insurance companies are rendering us? It is for the purpose of directing attention to these fundamental questions and throwing some light upon them, that this paper is written.

To most patrons of insurance companies the method of determining premium rates is a profound mystery. It is safe to say that in no other field of economic activity are so many millions of dollars paid by intelligent people with so little idea of the relation between the cost of what they are getting for their money and the price of it, as are paid to life insurance companies by their patrons. This fact is largely due to the absence of a

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practical check upon prices which exists to a greater or less extent in nearly all other forms of insurance. The price paid for fire insurance, for example, enters as an element into the cost of producing commodities or rendering services of various kinds, and the efforts of competitors in the same line of business to lower their cost of production leads them to put pressure upon the insurance companies for lower rates, and to search actively for the cheapest protection consistent with security. No such restraint exists in the case of life insurance. That form of insurance is in this respect in the position of a consumption good, in the purchase of which the great majority of people are far less careful to secure their money's worth than they are in the purchase of capital goods. Moreover, while the general theory of insurance rates is simple and easily understood, the application of the theory to the calculation of life insurance rates leads to very complex and intricate problems. This is partly due to the long term for which many life insurance policies run, but still more to the bewildering variety of contracts offered by the different companies. The result of the diversity of contracts is not only inability on the part of the prospective policy taker to compare the real cost of insurance in different companies, but a feeling of helplessness before the whole problem. As a prerequisite to an intelligent discussion of the proper cost of life insurance, a somewhat extended consideration of the technique of insurance and the practice of insurance companies is necessary.

Theory of life insurance rates

The general theory of insurance rates is very simple. An insurance premium consists of two parts, known as the net premium and the loading. The net premium makes provision for the payment of indemnities for the losses experienced by the insured; the loading provides for the expense of carrying on the business. If all insurance contracts ran for a short time, as for one year, and the interest on the funds in the hands of the insurance company were disregarded, the net premium for $1,000 of insurance would be ascertained by dividing the total amount of indemnity to be paid by the number of thousands of dollars of insurance issued. Thus if the insurance issued for

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a year is $1,000,000, and the indemnity to be paid $25,000, the net premium rate is $25 per $1,000. If, however, the premiums are paid at the beginning of the year, and the indemnities at the end of the year, and if the company can earn 4 per cent on the funds while they are in its hands, it would not need to collect $25,000 at the beginning of the year, but only such a sum as, invested at 4 per cent, will amount to $25,000 at the end of the year, or $24,038.46, and the net premium rate will be $24.04 per $1,000. To this net premium must be added such an amount per $1,000 for loading as will bring into the company a fund large enough to cover the expenses of the year. If the expenses amounted to $10,000, the loading would be $10 per $1,000, and the actual premium $34.04.

In one respect it is evident that this calculation is artificially simplified. The amount of loss which will befall a given amount of insurance is by no means fixed and known in advance, but is one of the elements of uncertainty with which insurance companies have to deal. The estimate of future loss is based upon past experience; and where that experience has shown a very fluctuating loss-rate from year to year, it is necessary for the insurance company, if it is to give security, to make a liberal allowance for the extent to which the actual loss in any year may exceed the average for a series of years. Life insurance, however, enjoys a peculiar advantage in this respect. The contingent event with which life insurance contracts deal is the death of the insured, and when enough lives are covered to overcome minor variations, the annual death-rate for each year of life is remarkably constant.

Past experience as to mortality is contained in so-called life or mortality tables. Such tables give the number dying at each age of life out of a stated number living at the beginning of that year. There have been a considerable number of such tables worked out on the basis of data derived from different sources. The ones used in the early days of life insurance were based on the experience of the general population, while those now in common use are based on data derived from the observation of insured lives. The two in general use in the United States are the Actuaries' Table, based on the mortality

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experience of seventeen English companies, and the American Experience Table, based on the records of thirty American companies.[1]

Contracts issued by a life insurance company fall into two general classes; those in which the company binds itself to pay indemnities if the insured die during the term of the policy, and those in which the payment of indemnities is contingent upon the survival of the insured to the end of a stated term. The former are known as life contracts, the latter as endowment

[1] For purposes of comparison the two tables are here given in condensed form. Column *a* gives the year of life, and columns *b* and *c* the number living at each specified age, out of 1000 living at the age 10, the former by the Actuaries' table, the latter by the American table.

CONDENSED MORTALITY TABLES

a Year of Life	*b* Actuaries' Table	*c* American Table
10	1000	1000
20	933	926
30	863	854
40	787	781
50	695	698
60	560	579
70	358	386
80	135	145
90	13	85

It will be seen from an examination of the two tables that the American table gives the highest death-rate for the earlier ages, while after the age 40 is reached the mortality indicated by the English table is the higher.

The following table gives in detail the American experience from age 30 to age 40:

AMERICAN MORTALITY TABLE

Year of Life	Number of Survivors of 1000 Living at Age 10
30	854
31	847
32	840
33	833
34	826
35	818
36	811
37	804
38	796
39	789
40	781

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contracts. The two are frequently embodied in the same policy. In general use the term "endowment" ordinarily refers to a combined life and endowment contract.

If all life insurance were paid for on what is known as the natural premium plan, *i. e.*, if the payment made by each insured at the beginning of each year were intended to cover only the mortality loss and the expense of that year, the calculation of life insurance rates would be as simple as the example given above. If, for example, a person of age 30 proposed to insure his life for one year in a company which used the American mortality table, and which assumed an income of 4 per cent from its investments, the net premium per $1,000 insurance would be ascertained by discounting for one year at 4 per cent an amount sufficient to pay $1,000 to each person dying during that year of life, and dividing the result by the number living at the beginning of the year. According to the table, out of 854 people who enter age 30, 7 die before they reach 31. Hence the premium rate would be ascertained by dividing $7,000, discounted at 4 per cent, by 854, or $7.88 per $1,000. To that net premium must be added the loading, the due share of the expense of carrying on the business for the year. If the same person desired to continue his insurance another year his premium rate would be calculated in the same way, and would amount to $7.95. For the third year it would be $8.01. And as the ratio of those dying during any year of life to those living at the beginning of that year steadily increases with advancing age, the amount of the net premium for a year's insurance would increase *pari passu*.

Such a method of apportioning the cost of insurance is known as the natural premium plan. There are no theoretical objections to it, but a very serious practical difficulty arises from the advancing cost of insurance. In old age that cost becomes practically prohibitive.

A second method of paying for life insurance is by means of a single premium for a term of years, paid in advance. Such a premium for three years' insurance would be calculated as follows: According to the American mortality table out of 854 persons entering the 30th year of life, 7 will die during that

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year, 7 during the next year, and 7 during the third year. A company which has insured 854 people of age 30 for $1,000 each must pay out $7,000 in indemnities at the end of the first year, $7,000 at the end of the second year, and $7,000 at the end of the third year. Discounting these amounts for one, two and three years respectively at 4 per cent compound discount and adding the results, we find that the present worth of the risks assumed by the company is $19,425.63. That is, that amount in hand at the beginning of the period, invested at 4 per cent compound interest, will yield enough to pay the indemnities as they fall due. If this is divided by 854, the number living at the age 30, the quotient, $22.75, is the amount which the company would need to collect from each of the insured. This is known as the single advance premium.[1] By continuing the process of discounting indemnities for later years the single advance premium for any term of years, or for life, may be ascertained. The insurance for life may be regarded as insurance for a term of years, the term running to the end of the mortality table.

The most prevalent method of paying for life insurance is by means of a uniform annual premium. This premium may be arranged to run for any number of years not exceeding the term of the insurance. The amount of the annual premium may be ascertained by finding how many dollars a man must promise to pay each year for the desired number of years, if living, in order that his promise may be worth as much to the company as the single advance premium for the same kind of policy. Thus in the example just used the single advance premium was $22.75. To change this to a level premium payable for three years, the following method might be used. Find the present value of the promise of a man 30 years old to pay a dollar a year in advance for three years, if he lives. The first payment may be counted at its full value, since it is virtually cash in hand. The second payment, however, must be discounted in the first place for the uncertainty whether the man

[1] This form of contract is comparatively little used in life insurance, but is very prevalent in fire insurance, where three, five, and seven years' insurance are frequently paid for in advance.

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will live to pay it. As at the beginning of the second year only 847 out of the original 854 persons will be living, the company will receive $847 when it is promised $854. When it is promised a dollar, therefore, it will receive $0.99. And even this amount will be received only after the lapse of a year, and to ascertain its present value it must be discounted for one year. The result is $0.95. The present value of the promise to pay $1 two years from date, if living, may be ascertained in the same way. As there will be only 840 survivors out of the 854 persons, the company will receive only $840 when it is promised $854, or $0.98 for every dollar promised; and this amount discounted for two years becomes $0.91. The sum of these three amounts, $1.00, $0.95 and $0.91, or $2.86, is the present value of the promise of a man aged 30 to pay a dollar a year in advance for three years if living. The single premium payable in advance for three years' insurance was found to be $22.75. If the company is to accept from each of the insured a conditional promise of a certain amount at the beginning of each of the three years in lieu of the single advance payment, and if the present value of such a promise to pay $1 is $2.86, it will be seen that the necessary level premium may be ascertained by dividing $22.75 by $2.86. The result is $7.95, and the level premium must accordingly be $7.95. Insurance paid for by equal annual premiums is said to be issued on the level premium plan.

It is unnecessary to show in detail how the same method may be applied for any term of years or for life. Moreover, there is no necessity that the term of insurance and the term of premium payments should be the same. Twenty years' insurance or insurance for life may be paid for in ten, fifteen, or twenty equal annual premiums. When the premium term is less than the insurance term, the policy is known as a limited payment policy. Thus we have limited payment life insurance and limited payment term insurance. It is evident that the shorter the term of premium payments, other things being equal, the larger each annual payment must be.

The method of calculating net premium rates for pure endowment insurance differs in no essential respect from the

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method already described. The chief difference is that the amount of indemnity to be paid by the company is dependent upon the number living at the end of the endowment period and not on the number dying during the term. Thus if 854 persons at age 30 take out 20-year pure endowment policies of $1000 each, the American mortality table shows that at the end of 20 years there will be 698 survivors. The company will have to pay indemnities amounting to $698,000. By discounting that amount for 20 years at 4 per cent compound discount, and dividing the result by the number living at the beginning of the term, the single advance premium of $373.02 is obtained. That can be changed to a level premium for any number of years by the method used with the life insurance premium. If the policy is a combined life and endowment policy each premium is computed separately, and the sum of the two is the required premium. Nor need the life insurance and the endowment insurance run for the same term of years, but, as is sometimes the case, the endowment insurance may terminate at one date and the life insurance continue to a later date or for life.

In the early years of a level-premium life policy, whether a straight life or a limited-payment life policy, and throughout the term of an endowment policy, the company is accumulating out of the net premiums a reserve on the policy, which is generally recognized to-day as the property of the policy-holder, held in trust by the insurance company. In the case of a level-premium life policy the reserve arises from the excess of the actual premium of any year over the natural premium for the same year, increased by the interest earnings. The reserve on such a policy increases every year from the beginning of the policy up to a point somewhere near the middle of the term, when the increasing natural premium becomes equal to the level premium. After that point is passed the company credits itself each year with so much of the reserve on the policy as is necessary to make up the difference between the natural premium and the premium the company is receiving. In this way the entire reserve is used up in paying premiums by the end of the term of insurance. On the policies of the insured who die

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before the reserve is thus exhausted the company is a gainer by the entire amount of the reserve at the time of death, since the natural premiums of the entire body of policy-holders are sufficient to pay the losses of the group. With a limited-payment policy the process is the same, but the reserve accumulates more rapidly during the early years of the policy, reaches a higher amount at its maximum, and is used up more rapidly during the later years, when the insured is paying no premium.

In the case of a pure endowment policy the reserve consists of the entire net premium increased by interest earnings. If a policy-holder dies before the end of the endowment period his reserve is apportioned *pro rata* among the survivors and helps to make up the endowment indemnities of the group at the end of the period.[1]

The reserve on a policy is the legal property of the insured, carried on the books of a company as a liability. When an indemnity becomes due through the death of a policy-holder, the loss inflicted upon the company is not the full face of the policy, but that amount minus whatever reserve the company is carrying in the name of the policy-holder. During the life of the policy-holder this smaller sum constitutes the net amount at risk on the policy, and at his death it measures the net mortality loss of the company. During the early years of a level-premium life policy this amount diminishes as the reserve increases, while during later years it increases as the reserve diminishes, and becomes again equal to the face of the policy when the reserve is exhausted. In the case of a pure endowment policy, on the other hand, the net amount at risk

[1] It is a mistake to talk about endowment insurance as pure investment. The holders of pure endowment policies who survive to the end of the endowment period derive a profit from the forfeited reserves of those who die before the end of the period, in addition to the interest earnings on their own premium payments. Over against this, however, must be set the cost of administration, covered by the loading added to the net premium, and the question of net gain or loss to the survivor turns upon the relation between these two items. In the case of ordinary endowment policies, which are in reality life and endowment contracts, the whole matter is further complicated by the accompanying life premium which the survivor pays during the whole period, and for which he receives no money return. Those premiums have paid for his "protection" during the endowment period, *i. e.*, they have been used to pay the death indemnities of those who died during the period.

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steadily diminishes as the reserve increases. At the end of the endowment period the reserve is equal to the face of the policy. The maturity of endowment policies, in other words, imposes no loss upon the company.

In nearly every state of the union a life insurance company is required by law to have an excess of assets over liabilities equal to the accumulated reserve on all its policies, as calculated on the basis of a mortality table and a rate of interest specified in the law. Hence this reserve is frequently called the legal reserve. Any additional assets of the company constitute the surplus, the property of the company, to which no individual policy-holder has any legal claim, except so far as a share in it may have been properly placed to his credit upon the books of the company. If a company desires to transfer an insurance contract to another company during the term of the insurance, it must transfer at the same time the accumulated reserve on the policy, as without it the second company could not afford to accept the contract. Hence this reserve is often referred to as the re-insurance reserve. While a company possesses net assets equal to the reserve on all its policies it is a solvent company, since it can at any time reinsure its risks and retire from business.

From this examination of the method by which net premium rates are calculated, it is obvious that so long as the different companies use the same mortality tables and the same assumed rate of interest they must reach the same net rates for the same kind of policy. No such uniformity is forced upon them in the matter of loading, the addition made to the net premium to cover the cost of carrying on the business. As a matter of fact, however, there is little difference between the companies in this respect. The loading is calculated as a certain percentage of the net premium, and while there are minor differences for different kinds of policies, the average loading in life insurance is about 25 per cent of the net premium, or 20 per cent of the total premium.

The surplus

If the mortality experienced by a life insurance company

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and the rate of interest earned on its funds corresponded exactly with the mortality and the interest rate assumed in calculating net premiums, and if the loading for expenses yielded only enough to cover the actual cost of carrying on the business, the insured would be getting their protection at cost price.[1] As a matter of fact, however, the mortality actually experienced by nearly all companies is very materially below the assumed mortality, the interest earned on investments is considerably in excess of the assumed interest, and in economically managed companies the expenses of management do not exhaust the income from loading.

From any or all of these sources the company may receive a surplus income. This extra income is at the beginning the property of the company. In the case of a stock company it may be utilized in any one of three ways. It may be distributed among the stockholders as dividends on stock, it may be returned to the policy-holders, or it may be retained in the possession of the company. When the dividend rate of a stock company is limited by law or by charter, only a definite part of the surplus income can be used in the first way.[2] The remainder of the surplus income, or profit, of stock companies, and the entire profit of mutual companies must be used in the second or the third method. It is necessary to consider briefly each of these methods and its results.

What proportion of the surplus income of the year shall be returned to the policy-holders and what part shall be retained by

[1] In the case of a stock company normal interest on the capital actually invested would have to be included as a part of the expense.

[2] The rate of dividend in different stock companies varies widely. Thus, of the twenty-one stock companies reporting to the Minnesota insurance department in 1904, six companies, with an aggregate capitalization of $4,150,000, paid no dividends in 1903; seven, capitalized at $1,365,000, paid 7 per cent; one, capitalized at $1,000,000, paid 8 per cent; four, capitalized at $4,350,000, paid 10 per cent; two, capitalized at $325,000, paid 12 per cent, while the Manhattan, capitalized at $100,000, paid 16 per cent. The average for the companies paying dividends was 8.81 per cent, while for all companies it was almost exactly 6 per cent. It must be noted, however, that in some companies the nominal rate of dividend is no indication of the rate of return on the actual investment. Thus the Prudential has so increased its capitalization by stock dividends that its nominal rate of 10 per cent represents a return of 219.78 per cent on the capital actually paid in in cash.

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the company, is arbitrarily determined by the company itself. It was formerly the custom of many companies to carry a fixed proportion of the surplus income to the permanent surplus account and to distribute the remainder among the policy-holders. The result was a fluctuating rate of dividend to the policy-holders, and this fluctuation was found to cause both distrust and dissatisfaction among the policy-holders. The nearly universal practice now is to determine the dividend rate first, and to fix upon a rate low enough to allow of a gradual increase from year to year. When this increase has gone as far as seems desirable, a new minimum rate is selected, and the process of gradual increase begins again.[1] The remainder of the surplus income is carried to the surplus account.

On annual dividend policies dividends to policy-holders are paid annually. On deferred dividend policies they are more or less formally apportioned annually by the company, but are paid only at the end of the deferred dividend period, usually five, ten, fifteen or twenty years. Many so-called deferred dividend policies are in reality semi-tontine policies, with a contract providing that if the insured dies or allows his policy to expire before the end of the dividend period, he shall forfeit the accumulated dividends on his policy, which shall be carried to the credit of the other policy-holders in the same group.

Such policies are falling into deserved disrepute and are in direct violation of sound insurance principles, introducing an additional element of uncertainty into a business whose one purpose should be to eliminate uncertainty. The claim sometimes put forward that they tend to equalize the cost of insurance by taking from those who die early, and so pay few premiums, and giving to those who live long and pay many premiums, is based on an entirely erroneous conception of the principles of

[1] The question of the most equitable method of apportioning the surplus income among the policy-holders is one which has received a great deal of attention from insurance experts. In the early days of life insurance crude methods were adopted, such as dividends in proportion to premiums. The present method, known as the contribution plan, is much more scientific and equitable. According to that plan the share which each policy-holder receives from the surplus income is made proportional to his contribution to that income. A detailed description of the method would require an undue amount of space.

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insurance. The premium pays for protection, not for the indemnity. In the case of level-premium life insurance so far is it from being true that those who die early ought to be taxed for the benefit of those who live long, that they are the very ones who are paying an excessive price for their protection, measured by the excess of the level premium over the natural premium at their age.

The funds left in the hands of insurance companies by holders of deferred dividend and semi-tontine policies are in a somewhat anomalous position. It seems to be the legal rule that when these funds have been definitely apportioned by formal act, and each man's share placed to his credit on the books of the company, the title passes to the policy-holder; but where the funds are carried as an undivided deferred dividend reserve, the individual policy-holder has no legal claim to any share of it. At the same time, in the state of New York, where a special tax is imposed upon the surplus of life insurance companies, the companies insist upon calling this reserve a liability, and their claim has been allowed.[1] Not the least objection to the deferred dividend form of policy is the fact that it increases unnecessarily the funds in the hands of the insurance companies, and leaves a wide margin of available resources at their disposal.

That part of the surplus income of the year's business, which is not credited as dividends either to stockholders or to policy-holders, is carried to the surplus account. The net surplus of a company consists of the excess of the assets over all liabilities including its legal reserve. The life insurance companies reporting to the New York insurance department showed a net

[1] In this connection it is interesting to note that during the year 1903 the following companies reported a reduction of this deferred dividend and special reserve fund to the extent indicated: Mutual Life, $5,954,379.45; New York Life $2,557,060.24; National Life, $21,967.49; Prudential, $214,215.05. The relatively small reductions in the case of the National Life and the Prudential might easily be brought about in the natural course of business. The presumption that the other companies used the funds for other purposes than those for which they had ostensibly been set aside is strengthened by the fact that in spite of dropping these larger amounts from the liability side of the ledger, the business of the year showed a net loss in the case of the Mutual, while the New York Life came out exactly even.

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surplus on December 31, 1903, of $167,795,982.59 in addition to "special funds," in which were included deferred dividend and tontine reserves of $151,006,074.58. The possession of a surplus is undoubtedly an aid to a company in securing business, giving it an appearance of stability.[1] It is difficult, however, to see any adequate reason for its existence in an old established company under existing conditions. Insurance authorities justify it as a safeguard against either one of two contingencies: a mortality in excess of that indicated by the mortality table, or a fall in the rate of interest below that assumed in calculating net premiums. How slight the probability is that either of those events will occur, will be evident when we study the actual experience of the companies.

After a company has accumulated a surplus, interest on such surplus is an item in its income account. When the premium income plus the interest on the reserve is sufficient to meet all liabilities and keep up the legal reserve, the interest on the surplus is all profit to the company, swelling the surplus income to be distributed at the end of the year. In practice, however, the reserve and the surplus are not kept distinct, but the income from all the invested funds of the company is compared with the interest necessary to keep the reserve up to the legal requirements, and any excess in the amount realized is carried to the profit of the company.

In calculating the net investment income many life insurance companies and insurance departments attempt to divide the total expense of the year into two parts, the insurance expense and the investment expense. The insurance expense is then charged against the loading, and the investment expense against the interest account. In practice one result of this method of book-keeping seems to be to enable a company to increase its insurance expense up to the full amount of the loading.

The appreciation or depreciation of securities and of real estate is the source of considerable gain or loss to an insurance

[1] This probably explains why the Equitable publishes to the world a surplus of over $70,000,000.00, while claiming before the New York tax department that its real surplus is a little over $10,000,000.00.

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company on account of the large funds it has invested in such property. This item does not appear in the annual reports given to the public by the life insurance companies themselves, and is rarely found in the reports of the state insurance departments. It is an item of general interest to the public and ought to appear plainly on the balance sheets of the company.

One more possible source of gain or loss to an insurance company remains to be noted. Nothing has been said as yet about the effect produced upon the financial condition of a company by the premature withdrawal of policy-holders. Nearly all life insurance companies now pay a certain sum in the form of cash or of an equivalent amount of extended or paid-up insurance to any of their policy-holders who fail to keep up their payments to the company, provided they have already made three full annual payments. This is known as the surrender value of the policy, and is equal to the net premium reserve on the policy at the time of surrender, minus a certain percentage which the company retains. If the policy-holder withdraws before the third annual premium has been paid, no surrender value is usually allowed. In that case the policy is said to lapse. On every lapsed or surrendered policy the company makes a profit equal to the difference between the net reserve on the policy and the surrender value, if any, allowed by the company.

It is not generally realized what a small proportion of the life insurance taken out is carried to its natural termination. The report of the Connecticut insurance department contains a table showing the percentage of the total number of policies terminated in a year by each of six methods: by death (life policies); by maturity (endowment policies); by expiry (term policies); by surrender, by lapse, and by change and decrease.[1] If we call the first three modes of termination the regular methods,

[1] As returned by many insurance companies, the reports of policies terminated contain another class called "not taken." This shows the number and amount of the policies actually made out by the companies and entered on the books on which the first premium was never paid. The companies operating in New York state in 1903 reported to the insurance department an aggregate of 82,927 policies under this head carrying $172,793,472 of insurance. The Connecticut department takes no account of the "not taken" policies in calculating its percentages.

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and the last three the irregular methods, we find that the percentage of the total insurance which falls in the former class varies from 3.50 (Hartford Life) to 79.58 (Provident Savings). The average of regular terminations for the 31 companies reporting to the department was 35.21 per cent of the total terminations, leaving 64.79 per cent as the share terminated irregularly, of which all but 5 per cent was by lapse or surrender.[1] So important is this item of lapsed and surrendered policies becoming that tables are constructed, showing the probable withdrawals in the same way that mortality tables show probable deaths.

It is by no means easy to decide just what treatment policyholders surrendering their policies before the regular time ought to receive. Such withdrawals exercise an unfavorable influence upon the mortality of the company, since healthy persons are more ready to let their insurance drop than are those who are conscious of physical weakness. The tendency of companies in recent years has been to lessen the sacrifice involved in surrendering a policy by increasing the size of the cash surrender values allowed, and the consequence is seen in an increasing proportion of surrendered policies. On every such policy the company makes an immediate profit, but what the final effect upon the company will be can be determined only after time has shown the effect of the withdrawals upon the mortality of the group.[2]

[1] Industrial insurance experiences very large percentages of lapsed and surrendered policies. Of the business terminated by the four industrial companies in Connecticut during the year 1903, 4.41 per cent was terminated by surrender, and no less than 90.10 per cent by lapse. This represents an enormous tax upon the resources of the laboring classes.

[2] Certain minor sources of gain or loss may deserve mention. The most important of them is the annuity account. The annuity business of insurance companies is a recent development, and comparatively few companies have as yet taken it up. It has generally been unprofitable for the companies. Of the twenty-five companies reporting annuity business for 1903 to the Minnesota insurance department, twenty-one had experienced a loss on the business during that year, and only four reported a gain. Other scattering items of gain or loss appear in the reports of the companies, for some of which, even when they are of very considerable magnitude, it is impossible to discover the source. Thus in the report of its business for 1903 the Mutual Life Insurance Company charges against the interest account the following item: "Profit and loss item—loss, $654,809.96." The only distinguishable items in its report of income and disbursements which are carried to that account are the profit and

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Financial results of insurance practice

The following analysis of the financial results of life insurance practice is based upon the 1904 reports of the insurance departments of Connecticut, Illinois, Massachusetts, Minnesota, New York and Ohio, and covers the business of twenty-four companies for the twelve months ending December 31, 1903. All the life insurance companies which reported to all the departments are included, except the John Hancock, the Metropolitan and the Prudential, a large part of whose business is industrial insurance. The list of companies, together with the statistics concerning them used in this paper, will be found in the accompanying table. The attempt is made to bring out clearly in the table not only the relation between the total income and the total expense of each company for all the companies, but also the state of each of the separate accounts to which the difent parts of the income are theoretically assigned. Let us begin with an examination of the mortality account of the companies.

Column 5 gives the net mortality loss to be expected by each company during the year according to the mortality table; *i. e.*, the sum of the indemnities the company has prepared to pay minus the sum of the reserves it has accumulated on the policies to fall due. Column 6 gives the actual net mortality loss experienced by each company, and column 7 gives the ratio of the latter to the former. It will be seen that no company experienced a mortality loss as large as it had prepared for. The rate per cent of the actual loss to the anticipated loss varied from 57 to 89. The average rate per cent for all the companies combined was 76. There were fourteen companies with rates below the average, and ten with rates above it. The average is raised by the relatively high rate of a few of the larger com-

loss on the sale or maturity of ledger assets. But these two items show a balance in favor of the company of $778,141.41, thus increasing the unexplained loss to $1,432,951.37. This item does not include decrease in market values, which is entered separately. There is also an unexplained "suspense" credit of $956,060.52 in the same report. In the report of the New York Life Insurance Company for the same year appears an item: "Profit and loss items—gain, $800,592.89." The net profit on sale or maturity of ledger assets was $262,100.89. The source of the balance of the gain cannot be determined from the report.

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BUSINESS OF INSURANCE COMPANIES, 1903

1	2	3	4	Mortality, net		7	Interest Earnings		10	11	Insurance Expenses		14	15
				5	6		8	9			12	13		
No.	Name of Company	Capitalization [1]	Premium Income, 1903 [2]	Expected [3]	Actual [4]	Per Cent [5]	Interest Required [6]	Net Interest Receipts [7]	Per Cent [8]	Interest Rate Per Cent on Mean Assets [9]	Loading [10]	Actual Expenses [11]	Per Cent [12]	Management Expense Per $1,000 Insurance [13]
1	Ætna	$2,000,000	$8,896,452 83	$2,471,163 00	$1,621,252 91	66	$2,240,187 87	$2,679,388 88	119	4.24	$1,701,084 07	$1,789,469 40	105	$8 21
2	Conn. Mutual	.....	5,325,082 06	2,413,075 50	1,930,565 18	80	2,112,788 40	2,408,713 81	114	3.82	1,025,562 79	869,650 99	85	5 48
3	Equitable	100,000	58,637,889 63	14,684,533 00	13,124,807 94	89	10,829,037 96	13,638,526 98	126	3.70	14,562,639 99	14,081,741 24	97	9 98
4	Fidelity Mutual	.....	3,145,652 32	1,376,556 04	936,629 77	68	190,077 84	230,052 34	121	4.49	1,112,015 04	1,092,784 84	98	11 42
5	Germania	200,000	4,172,164 38	885,980 05	642,119 97	72	1,063,627 19	1,290,232 18	121	4.17	974,627 88	1,091,238 40	112	11 29
6	Home	125,000	2,747,783 03	701,677 00	486,279 95	69	528,555 00	581,148 72	110	4.20	592,282 01	765,281 18	129	11 80
7	Mass. Mutual	.....	6,015,010 75	1,778,000 00	1,143,266 90	64	1,146,000 00	1,319,021 20	115	4.31	1,523,000 00	1,179,628 36	77	7 37
8	Mutual Benefit	.....	12,672,873 35	4,854,850 00	3,794,356 00	78	3,094,687 20	3,638,692 44	117	4.56	2,623,366 69	2,150,051 98	82	7 11
9	Mutual Life	.....	60,151,019 66	15,465,272 29	12,148,765 83	79	12,650,350 00	15,231,240 40	120	3.96	13,232,103 61	14,641,421 17	112	10 52
10	National	.....	5,224,447 87	1,298,138 25	737,742 25	57	957,532 95	1,158,139 92	121	4.49	966,693 18	1,200,908 39	124	10 01
11	New Eng. Mutual	.....	4,932,087 68	1,644,930 87	1,223,700 18	74	1,269,957 49	1,412,868 91	111	4.11	1,135,591 74	1,102,744 86	97	7 92
12	N. Y. Life	.....	73,382,174 10	16,721,630 30	12,129,776 53	73	11,120,311 00	13,231,004 96	119	4.17	16,830,852 27	17,148,038 78	102	10 54
13	Northwestern	.....	26,155,649 60	6,270,110 00	4,135,552 35	66	5,146,997 92	7,282,040 88	141	4.21	5,834,402 86	4,467,134 06	77	6 56
14	Penn Mutual	.....	11,848,666 89	3,114,021 00	2,007,878 23	64	2,167,729 00	2,436,302 77	112	4.58	2,945,327 79	2,323,588 26	79	8 63
15	Phœnix	.....	2,969,605 94	832,365 00	638,162 00	77	612,863 00	763,834 00	125	4.80	581,771 00	731,483 00	126	10 23
16	Prov. Life & Trust	1,000,000	6,391,882 09	1,562,492 94	954,785 00	61	1,723,647 50	2,127,588 79	123	4.30	1,151,263 19	1,264,889 65	110	8 55
17	Prov. Savings	100,000	3,646,220 86	1,412,931 00	1,218,992 40	86	219,187 83	258,805 43	118	4.05	1,253,714 56	1,357,306 34	108	14 98
18	Security Mutual	.....	1,211,808 34	514,581 00	364,746 19	71	32,435 00	48,408 31	149	3.96	463,631 54	635,108 00	137	16 01
19	State Mutual	.....	3,652,184 47	1,028,946 64	819,281 95	80	793,076 84	939,484 81	118	4.28	848,479 16	823,014 40	97	8 34
20	Travelers'	.....	4,303,999 65	1,263,000 00	1,031,477 00	82	1,074,592 00	1,293,743 67	120	4.27	382,995 17	792,666 14	207	6 38
21	Union Central	100,000	6,667,073 27	1,817,330 00	1,041,176 00	57	1,198,872 00	2,058,082 83	172	5.72	1,214,431 90	1,341,680 43	110	7 10
22	Union Mutual	.....	1,978,288 65	594,430 00	399,543 65	67	362,170 00	370,630 88	103	3.81	492,572 35	648,464 47	132	11 60
23	United States	440,000	1,411,486 43	446,400 00	375,727 73	84	372,819 54	397,573 82	107	4.69	422,104 36	534,471 10	127	11 96
24	Washington	125,000	2,789,089 08	616,981 00	547,110 00	89	670,169 00	715,457 02	107	4.35	644,359 85	948,774 30	147	14 62

[1] N. Y. p. xxxii. [2] N. Y., p. xxxi. [3] Minn. p. xxxiv. [4] Minn. p. xxxiv. [5] Minn. p. xxxi. [6] Minn. p. xxxvii. [7] Minn. p. xxxvii.
[8] Calculated. [9] Conn. p. 682. [10] Minn. p. xxxvi. [11] Minn. p. xxxvi. [12] Minn. p. xxxvi. [13] Conn. p. 683.

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BUSINESS OF INSURANCE COMPANIES, 1903—*Concluded*

No.	Name of Company	Surrender Values			Gain and Loss Exhibit.[4] (In Nearest Thousands. Gains +; Losses, —.)											No.
		16	17	18	19	20	21	22	23	24	25	26	27	28	29	
		Reserves[1]	Values Paid[2]	Per Cent[3]	Mortality	Surrenders	Loading	Interest	Annuities	Changes in Market Values	Miscellaneous Items	Combined Gain or Loss	Stock Dividends	Dividends to Policy Holders	Net Gain or Loss	
1	Ætna	$848,555 00	$674,063 57	79	+ $850	+ $174	— $194	+ $544	.....	— $284	— $6	+ $1,085	$194	$679	+ $212	1
2	Conn. Mutual	644,285 00	581,393 77	90	+ 483	+ 63	+ 164	+ 304	— $1	— 769	— 156	+ 88	.....	1,360	— 1,272	2
3	Equitable	8,914,822 28	7,434,119 04	83	+ 1,560	+ 1,481	+ 481	+ 2,809	— 7	— 3,051	+ 10	+ 3,282	7	5,682	— 2,407	3
4	Fidelity Mutual	154,556 53	122,428 97	79	+ 440	+ 32	+ 19	+ 40	— 0	— 15	+ 3	+ 519	.....	45	+ 474	4
5	Germania	496,074 40	335,200 17	68	+ 240	+ 158	— 115	+ 223	— 8	— 68	— 22	+ 409	24	198	+ 187	5
6	Home	280,307 00	151,932 13	54	+ 215	+ 163	— 273	+ 153	— 14	— 180	— 4	+ 60	15	231	— 186	6
7	Mass. Mutual	703,510 00	597,196 88	85	+ 640	+ 107	+ 345	+ 174	.....	— 228	— 108	+ 930	.....	828	+ 102	7
8	Mutual Benefit	1,674,955 00	1,483,005 60	89	+ 1,060	+ 192	+ 473	+ 544	— 22	— 273	— 117	+ 1,858	.....	1,837	+ 21	8
9	Mutual Life	5,737,919 00	3,963,060 88	69	+ 3,272	+ 1,775	— 1,409	+ 2,581	.....	— 8,723	— 655	— 3,159	.....	2,994	— 6,153	9
10	National	681,438 92	571,718 81	84	+ 560	+ 110	— 234	+ 200	— 20	— 104	— 28	+ 484	.....	162	+ 322	10
11	New Eng. Mutual	781,018 34	682,632 94	87	+ 421	+ 98	+ 33	+ 143	.....	— 417	+ 5	+ 283	.....	549	— 266	11
12	N. Y. Life	11,147,602 58	8,647,841 26	78	+ 4,592	+ 2,500	— 317	+ 2,110	+ 15	— 6,616	+ 801	+ 3,085	.....	5,450	— 2,365	12
13	Northwestern	3,414,145 00	2,975,072 71	87	+ 2,135	+ 439	+ 1,367	+ 2,135	— 9	— 77	— 907	+ 5,083	.....	4,456	+ 627	13
14	Penn Mutual	1,049,501 00	882,464 02	84	+ 1,106	+ 179	+ 622	+ 268	— 5	— 379	— 38	+ 1,752	.....	785	+ 967	14
15	Phœnix	340,603 00	256,787 00	75	+ 194	+ 84	— 150	+ 151	— 3	— 13	+ 11	+ 274	.....	265	+ 9	15
16	Prov. Life & Trust	622,526 67	571,103 85	92	+ 608	+ 51	— 250	+ 530	— 19	— 875	+ 100	+ 146	.....	818	— 672	16
17	Prov. Savings	285,861 00	248,428 77	87	+ 194	+ 37	— 104	+ 40	— 4	— 40	+ 65	+ 188	7	139	+ 42	17
18	Security Mutual	61,619 00	22,171 80	36	+ 150	+ 39	— 176	+ 14	.....	— 3	+ 3	+ 27	.....	5	+ 22	18
19	State Mutual	460,358 81	391,133 67	85	+ 210	+ 69	+ 25	+ 146	.....	— 229	+ 80	+ 303	.....	463	— 160	19
20	Travelers'	622,530 00	306,797 66	49	+ 232	+ 316	— 410	+ 219	— 7	— 459	+ 78	— 32	.....	.....	— 32	20
21	Union Central	505,259 00	445,501 28	88	+ 776	+ 62	— 338	+ 1,070	— 8	+ 9	— 31	+ 1,539	10	450	+ 1,079	21
22	Union Mutual	228,409 60	138,875 80	61	+ 192	+ 88	— 158	+ 8	+ 0	— 135	— 45	— 51	.....	74	— 125	22
23	United States	373,137 82	199,358 75	53	+ 71	+ 175	— 112	+ 25	+ 1	+ 10	— 40	+ 129	31	111	— 13	23
24	Washington	417,988 82	221,367 70	53	+ 20	+ 116	— 198	+ 48	+ 2	+ 80	+ 0	+ 68	9	156	— 97	24

[1] Minn. p. xxxiv. [2] Minn. p. xxxiv. [3] Minn. p. xxxiv. [4] These figures are taken from the reports of the individual companies as published in the Minnesota Insurance Report, 1904.

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panies, notably the Equitable (89 per cent), the Provident Savings (86 per cent), and the Mutual (79 per cent). It seems therefore that the mortality tables now in use indicate a mortality loss nearly a third larger than the loss actually experienced. In fact, so far is it from being the case that the mortality table used indicates the mortality actually expected, that conservatively managed companies which exercise care in the selection of risks consider an actual mortality loss of 80 per cent of the indicated loss as distinctly unfavorable. The difference between the amounts in column 5 and those in column 6 forms part of the surplus income or profit of the year, and appears as the first item in the gain and loss exhibit (see column 19).[1] The actual gain of the twenty-four companies from this source during the year 1903 was $20,315,698.67. The premium income of the companies for the same year was, according to the New York report, $318,328,592.93. The profit from mortality, therefore, was nearly 6.5 per cent of the entire premium income.

The second element of the income to consider is the interest earnings of the reserve. Column 8 gives the amount of interest required according to the rate assumed by the companies in calculating net premiums. Column 9 gives the net interest earnings on all the invested funds of the companies, the amount being obtained by subtracting the investment expense of each company from its gross interest income. Column 10 gives the ratio of the actual interest obtained during the year to that required. This column shows that the net interest income of every one of the companies was more than sufficient to meet the requirements of the reserve. The ratios vary from 103 per cent to 172 per cent. The average for all companies is 122 per cent, and there are eighteen companies with rates below the average, while only six companies have rates above it. The total profit realized by the companies from this source was

[1] The figures in column 19 are taken from the detailed reports of the different companies contained in the Minnesota report, from which columns 5 and 6 are also compiled. Unfortunately, as in many other instances, there are discrepancies between the different parts of the same report which it is impossible to reconcile with the data available.

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$13,878,711.42, which is 4.4 per cent of the premium income. This indicates nothing definite as to the real adequacy of the assumed rate of interest, since a considerable part of the gross interest income is earned by the surplus. Column 11, however, gives the net rate of interest actually earned by each of the companies as calculated by the Connecticut insurance department on the basis of the mean amount of admitted assets for the year. This table shows rates varying from 3.70 per cent to 5.72 per cent. Five companies have rates below 4 per cent, eighteen between 4 per cent and 5 per cent, while one company, the Union Central, earned more than 5 per cent (5.72 per cent). The average of the rates is 4.3 per cent.[1] Meantime these same companies are calculating reserves on the basis of interest earnings of 3 or 3½ per cent. It is safe to say that the rate actually realized on investments is 1 per cent in excess of the tabular requirement.

The comparison of the loading and the expense account of the twenty-four companies may be made on the basis of columns 12, 13 and 14, the last column giving the ratio of the insurance expense of each company to its income from loading. This ratio is very diverse, varying from 77 per cent in the Massachusetts Mutual and the Northwestern to 207 per cent in the Travelers'. The average for all the companies combined is 100.5 per cent. Only nine companies have rates below the average, while fifteen run above it. Among the companies with a low rate, however, are several of the large companies, including the Massachusetts Mutual (77 per cent), the Northwestern (77 per cent), the Penn Mutual (79 per cent), the Mutual Benefit (82 per cent), and the Equitable (97 per cent). It may fairly be said, therefore, that it requires no excessive degree of economy to enable an insurance company to keep its expenses within the limits imposed by the loading, while some companies make a large saving from that source. In this con-

[1] The average rate for the thirty companies included in the Connecticut report is 4.09 per cent. This average is kept down by the low rate realized by some of the companies with large assets, notably the Prudential (3.63 per cent), the Equitable (3.70 per cent), the Connecticut Mutual (3.82 per cent), the Mutual Life (3.96 per cent), and the Metropolitan (3.98 per cent).

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nection column 15 is of interest as showing the cost of administration of the different companies per $1000 of mean insurance in force. This rate shows an extremely wide fluctuation, varying from $5.48 (Connecticut Mutual) to $16.01 (Security Mutual). There seems to be no very close connection between the rates thus established and those shown in column 14 beyond a general tendency to vary in the same direction.

Columns 16, 17 and 18 show the results of the dealings of the companies with their withdrawing policy-holders. Column 16 indicates the amount of the reserve carried in the name of these policy-holders; column 17, the amount actually paid to the policy-holders on their withdrawal; and column 18, the relation between the two. The last column shows that the surrender values allowed varied from 36 per cent (Security Mutual) to 92 per cent (Provident Life and Trust) of the full reserve on the surrendered and lapsed policies. The balance, therefore, varying from 8 per cent to 64 per cent of such reserves, became an item of profit to the companies. For the whole twenty-four companies, 21.4 per cent of the reserves on surrendered or lapsed policies was thus retained. Ten companies retained a larger percentage than the average, fourteen companies less than the average.[1] The full reserve on all surrendered and lapsed policies was $40,446,983.77, and the surrender values paid $31,903,657.03, leaving a profit for the twenty-four companies of $8,543,326.74. This is 2.7 per cent of the premium income.

The actual gain or loss of each company from each of the sources examined is embodied in columns 19 to 22. Column 23 gives the result of the annuity business, column 24 the net result of changes in the market value of real estate and securities, and column 25 the balance of other profit and loss items. Finally, the net result of the business of the year is summed up in column 26, which shows the net gain or loss of each company for the year. The general shrinkage in market values which occurred in 1903 is reflected in column 24. Only three

[1] The proportion of the reserve returned to withdrawing policy-holders is not necessarily indicative of the attitude of the company toward them. It is largely influenced by the proportion of withdrawals during the first two years of the life of the policies, when no surrender values are allowed.

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companies could record a net gain from changes in market values, while twenty-one reported losses. For many companies the losses were large, the maximum being reached by the Mutual, which reports a loss of $8,723,000 from this source. In spite of this unusual form of loss for the year, column 26 indicates that only three companies, the Mutual, the Travelers' and the Union Mutual failed to make a profit on the year's business. The aggregate loss of the three was $3,242,000. The aggregate gain of the other twenty-one companies was $21,592,000, leaving a favorable balance for all companies of $18,352,000.

Of this surplus income a small amount was paid out in dividends to stockholders, as shown in column 27, and a much larger part was apportioned among the policy-holders. The total appropriations for these two objects exceeded the total profit for the year, and just one-half of the companies were left with a final unfavorable balance. Column 29 shows the amount finally carried to the account of surplus or of special funds. The entire business of the twenty-four companies shows a net loss for the year of somewhat over $9,000,000. It must be borne in mind, however, that the net shrinkage in the value of real estate and securities far more than accounted for this falling-off in surplus. The net loss from that source was about $23,000,000. If that loss had been escaped, the deficit of $9,000,000 would have been replaced by a surplus of $14,000,000, the amount realized from the insurance business itself, after $28,000,000 had been returned to the policy-holders in the form of dividends.

Conclusion

Whether we reach our results by an analysis of the elements of the income of insurance companies and the relation of each element to the purpose to which it is theoretically assigned, or examine directly the gain and loss account of the insurance companies, the same conclusion is forced upon us, that the premium rates are unnecessarily high. We have seen that the average experience of twenty-four companies shows a saving on mortality of over 20 per cent, an excess of interest earnings

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of nearly or quite 1 per cent, and a generous profit from lapsed and surrendered policies, while the loading is just sufficient to cover the cost of carrying on the business. The gain and loss exhibit indicates that but for the depreciation of securities during the year 1903 the insurance operations of that year would have brought in to the companies a profit of more than $40,000,000 to be returned to the policy-holders, or added to the surplus. With no improvement in the methods and practices of insurance companies, a reduction of 20 per cent or 25 per cent in premium rates is possible for a company managed with average care and efficiency, and is in every way desirable.

But to bring insurance rates down to the present cost-level is only half enough. The cost itself ought to be lowered. It is demonstrable that some of the practices of insurance companies tend to increase their mortality loss, that a higher net rate of interest could be secured on their investments, and that the cost of administration is often extravagantly high. Improvement in any of these particulars would materially lower the cost of insurance, and make possible a further reduction in premium rates, resulting in a wider utilization of the benefits of insurance by people of small or moderate income.

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PENDING PROBLEMS IN PUBLIC FINANCE[1]

IN addressing myself to the task of presenting a survey of the practical problems of public finance I am naturally confronted by the difficulty that the actual problems assume a different aspect in various countries, an aspect largely colored by fluctuating political, economic and social conditions. Notwithstanding this diversity, however, there can be discerned an underlying uniformity in the modern fiscal development of civilized nations, and it will be my endeavor to point out some of the different phases of this development.

To discuss all the modern problems of finance would be impossible within the limits of a single paper. Whole groups of subjects manifestly must be omitted. The topic of expenditure, for instance, may be passed over entirely for the reason that expenditure is chiefly statesmanship; the fiscal principles here are principles of interpretation rather than of construction. Again, the subject of public credit has been so thoroughly elaborated that the scientific problems which await elucidation are comparatively few and unimportant. The budget, also, while susceptible of undoubted improvement, especially in the theory of municipal accounting, is so closely intertwined with administration that it would be hopeless to attempt in this place to disentangle it. Finally, in the great domain of public revenue, the subject of income from government industry is of predominant economic, rather than fiscal, importance and may thus fitly be excluded from our short survey. There thus remains only the field of taxation, a field broad enough and sufficiently hedged about by difficulties to warrant a closer examination.

There are three considerations which distinguish the modern science of finance in the study of tax problems. These are, in order, the pursuit of justice, the emphasis put upon the modern economic phenomena, and the insistence upon the conformity with economic principle. Let us consider each of these in turn.

[1] Read before the Congress of Arts and Sciences, St. Louis, September, 1904.

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I

The first point is well summed up in the alleged conflict between the fiscal and the social principles of finance. I say alleged conflict because in reality there is, from a deeper point of view, no such conflict at all. It is sometimes asserted that the fiscal object of taxation is simply to secure revenue, while the social object is to effect some desirable change in social relations. This antithesis rests upon a failure to observe that finance like economics is a social science, and that even from the narrow political point of view of the relation between the government and the citizen, the government cannot derive any revenue—that is, cannot take any part of the social income—without inevitably affecting social relations. The fact that the government has in mind solely the fiscal aim of securing revenue, does not alter the social consequences of the particular revenue system. In modern times social conditions are influenced to a large extent by changes in wealth. Every tax necessarily affects the wealth of individuals, and if we could in all cases trace the final consequences of even a "purely fiscal" tax, all kinds of unforeseen results, social as well as fiscal, or perhaps better, social because fiscal, would disclose themselves. Economics and finance deal not with intentions but with results. The function of fiscal science is to point out to the legislator the necessary results of his actions.

The distinguishing mark of modern social science is that it endeavors to explain not only what is, but also what should be. All practical action is thus brought to the crucible of justice and all systems of taxation are put to the test of conformity with this principle, irrespective of the intentions of the legislator. The great problem which still remains, however, is to elucidate the exact nature of this economic justice. Everyone agrees that the essential ingredients of this scheme are equality, or uniformity, and universality of taxation. When, however, an attempt is made to interpret them and to outline the practical form which these principles should take, there is considerable disagreement, because the actual nature of the principles has not been thoroughly analyzed. It betokens, however, a step forward in all practical finance that a more or less con-

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scious effort is everywhere being made to bring the tax system into some manner of conformity with the principle, however dim its outlines may be.

II

The second point, which differentiates modern taxation from that of the past, is the emergence of the new economic substratum of society. These new facts of fiscal importance may be summed up under the following heads:

First, the increasing economic significance of the laboring class with the corresponding growth in the importance of popular consumption. It is not meant by this to imply any depreciation of the rôle played by capital. On the contrary, it is a platitude to say that this is preëminently the capitalistic age. What it is intended to emphasize is that precisely because of the growth of modern economic well-being, the great mass of the community represented by the laborers are acquiring an increased consuming capacity, and that their demand is the very tap-root of modern progress. The recognition of this fact has brought about vast changes in modern tax systems.

In the second place we have to note the coming to the fore of the corporation as the typical form of modern business enterprise. The evolution from the individual to the early partnership, from the partnership to the joint stock company, from the joint stock company to the corporation, and from the corporation to the trust is one of the most instructive lessons in institutional development. Finance has not to study it, but to accept it. Tax systems framed upon the assumptions of the older conditions, where corporate activity was the exception rather than the rule, are manifestly inadequate and belated.

The third change consists in the growing importance of the problem of franchises. This is not the same as the corporate problem, although often confused with it. A franchise may assume many forms. It may be a patent or copyright in the hands of an individual; it may be the privilege of inheriting property, whether that privilege be granted to a single person or a group; it may be a right accorded to corporations to utilize opportunities which originally belonged to the community, and

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which are for sufficient reasons given away. Such privileges and franchises have indeed existed from of old, but the complexity of modern society and the immense increase of public wealth have vastly enhanced both their extent and their significance. How to analyze them, how to measure them, and how to fit the result into the system of public revenue is becoming one of the most subtle and difficult problems, which will no doubt long perplex the trained student as well as the legislator.

The fourth change is the economic revolution affecting the distribution of governmental authority as between the general and the local government. The cause of this change, as is well known, is not only the forging to the front of the interests of peace rather than of war, but above all the agglomeration of modern population into urban centers. With the segregation of wealth and property into great local masses, there is coming the need of administering to the wants of such complex aggregates. Accordingly, while the last century has shown a great increase of national expenditure and income, there has been a far larger growth in local expenditures and incomes. And whereas formerly local taxation could be treated as a relatively unimportant appendage to national taxation, it now claims a distinct and separate place of its own.

Side by side, however, with this localization of wealth there has been a counter movement in the direction of the nationalization of wealth, in the sense of nationalization in the opportunities of securing wealth. The economic activities of to-day have far outgrown the swaddling clothes of former times. Business enterprise not only covers the whole country, but encircles the globe. Citizenship in the various commonwealths of a federal state, like Germany, Australia, Switzerland or America, has become in great measure meaningless because its economic basis has been so effectively weakened. In all federal states, therefore, the problem of taxation is complicated by the difficulty of correctly apportioning the burdens among the constituent commonwealths. In every country, federal or not, a similar difficulty exists as between the local government and the state government. Problems of double taxation resting upon interstate and interlocal complications arise to confront us at every turn.

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The fifth and final point is that of modern social solidarity. In former times the close relation subsisting between the various branches of productive enterprise in the community was beclouded by the predominant social and political influence secured by some one factor. In an economy based upon slavery the only importance of a slave is that of a working tool; in an economy based upon the predominance of the large landowner, the function of the moneyed and commercial interests is apt to be overlooked. In the early stages of the factory system, where the mass of the laborers are regarded from the point of view of production rather than from that of consumption, it is natural that the socialistic conception of class conflict should emerge. A more careful study, however, of modern industrial society has shown that while indeed there is no such thing as a natural harmony of interest, there is a distinct and inevitable influence, sometimes for good, sometimes for evil, exerted by each factor of production upon the other, and by each social class upon its neighbor. Laborers and capitalists, landowners and traders, factory-owners and financiers are pursuing their own interests, and in so doing they necessarily react upon the interests of the others.

The distinguishing mark of modern economic life in this respect, is the realization of these close economic interrelations. The machinery of production has become so subtle and so complex that the disarrangement of any one part throws the whole out of gear. The overburdening of any one class may have the most unlooked-for consequences upon another. Taxation, as a weapon of retaliation, often proves to be a boomerang. An undue pressure on a railroad may decrease facilities rather than increase revenue. The assessment of mortgages may hit the farmer rather than the money-lender. The taxation of the laborer may limit the market rather than increase the profits of the capitalist. Whether we desire it or not, modern economic conditions are engendering a situation where every one is in a larger sense his brother's keeper and where at all events it is unsafe to disregard the often hidden and recondite, but none the less active, influence exerted by each economic class upon the others.

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All these changes in economic life have affected the practical system of taxation throughout the world. They have created new problems for the scientific student. The justification of finance, however, as a science, rests upon the correlation of fiscal problems with economic principle. We thus come to the third part of the discussion, the influence of economic analysis on fiscal facts.

III

The first result of economic analysis was to show the errors of a tax system resting exclusively or in great part upon consumption. The theory of consumption as the test of faculty or ability to pay was promulgated in the later middle ages by reformers who despaired of reaching the privileged class in any other way. Every man, it was said, must consume and the more idle a man is, the more luxuries will he consume. A consumption tax thus seemed to be the sole method of securing universality of taxation. To these considerations there was added the thought on the part of some that so far as the working classes were concerned, taxes on the necessities of life would be admirable, in that they would compel the laborers to work harder.

In opposition to this view, a more careful economic analysis disclosed the fact that a tax on consumption, regarded as a universal system, was unwise and unjust—unwise because a tax on mere luxuries would be most disappointing in the yield; unjust because a tax on necessities would fall with crushing severity on those classes which could least afford to bear the burden. Above all, it was recognized that by checking consumption we were thereby checking production and that a general tax on consumption would possess most of the disadvantages of a tax on production and few of its advantages. Consumption taxes, therefore, as a sole or chief reliance of the government, have been fast disappearing. One of the first acts of the American government in Cuba and the Philippines was to abolish the *consumo* tax; and it is well recognized that the continuance of the municipal *octroi* in France and Italy is deplored by all serious students.

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The next triumph of economic theory was to disclose the dangers of a system of taxation resting on production and exchange. In one sense indeed every tax that is not a tax on consumption may be regarded as a tax on production, for all wealth consists either of producers' goods or of consumers' goods. It would therefore seem to be impossible to avoid the imposition of taxes on production. In the sense in which the term has usually been employed, however, a tax on production has denoted a tax imposed directly, and at a late stage, on the process of completing the finished article. Regarded in this light, such taxes manifestly impede the process of production and are to be deprecated because they affect the able and the shiftless producer alike. Taxes on production often put a premium on inefficiency and are apt to clog the wheel of industrial progress. The tendency of modern statesmanship has accordingly been away from reliance on such methods.

Perhaps the greatest change in fiscal theory during the nineteenth century has been, thirdly, to analyze and to explain the need of taxing shares in distribution rather than consumption or production. A vast amount of ingenuity has been expended upon the attempt to disclose the real meaning of faculty or ability to pay as measured by the property or the income of the individual. When we come to consider the facts, however, there are two striking considerations that confront us. The first is the pitifully small proportion that the income tax bears to the total revenue. In France, for instance, there is no income tax at all and even in England and Germany the proceeds of the income tax are utterly insignificant when compared to the total revenue, state or local. The scientists may discuss and do discuss the problems of progression and differentiation of taxation, and all of the discussions rest on the assumption that the burdens upon the individual must be in a certain proportion to this income; yet we find as an actual fact that only a most beggarly proportion of the taxes in the civilized countries of to-day stand in any direct relation to the income of the taxpayer.

Not alone do the income taxes form so small a part of the whole but furthermore in most countries the so-called income

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taxes are really not income taxes at all in the sense of taxes on the personal income of the individual. In England, for example, it is well known that the so-called income tax is merely a collection of taxes on the thing which yields the income rather than on the person who receives it. That is, it is a collection of taxes on produce and not on income. The only exception is the famous schedule "D" which is notoriously the least successful of all. It may be claimed indeed that in Prussia the income tax is really what it purports to be, but all who have made a study of the system know that when similar methods were employed in England at the beginning of the nineteenth century, they proved to be a dismal failure. The English administrators consider the principle of their tax far superior to that of the Prussian; and to the extent that this contention is justified, the superiority rests upon the fact that the tax is not one on personal income. Even in Prussia itself, the home of efficient bureaucracy, the tax is sometimes called the *Lug und Trug System*. The same repugnance to the personal element in the income tax, which is found in England, explains why it has been impossible to introduce the system into France, with its still lively recollection of the abuses of personal taxation under the *ancien régime*, and explains also why the income tax is beyond the range of practical politics in the United States.

We thus find the remarkable fact that while the science of finance has been elaborating its fundamental principles, it has succeeded in some respects but has failed in others in imprinting its conclusions upon legislation. It has brought the actual taxes on consumption and production to a great extent into line with its conclusions, but it has spent most of its time during the nineteenth century in working out the principles of an income taxation, which is either not accepted in legislation or which, if accepted, is realized to so small an extent and in such a half-hearted way as to be on the whole of little consequence.

The conclusion is hence forced upon us that the fiscal analysis has not proceeded sufficiently far. We are indeed grateful for what has been accomplished, but we have evidently not yet reached the goal. We need, therefore, a fourth and

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final economic principle to help us thread our way through the maze of actual fiscal facts.

This fourth principle is that of the social versus the individual basis of taxation. The conception which has dominated fiscal science until lately is the individual conception. Direct taxes have in theory been preferred to indirect taxes, because they were supposed to rest where they were imposed, and thus to help in securing justice as between individuals. The goal of all taxation was the attainment of a method in harmony with individual faculty. The first serious breach in this doctrine was made by the diffusion theory of taxation. The diffusion theory erred, indeed, in that it went too far, attempting to show that every tax is always and inevitably shifted off from the shoulders of the original payer. The value of the diffusion theory, however, consists in the fact that it put the problem in the right way, by presenting the societary aspects of taxation.

Nevertheless, the diffusion theory made the situation too simple. It has quite correctly been termed superficial and one-sided. To make it at all serviceable, it needs to be supplemented by another theory, which I have taken the liberty of calling the absorption theory of taxation. The absorption theory rests upon the doctrine of capitalization. That is to say, where the tax is not shifted from the seller to the buyer and where the economic good has a rental value as well as a capital value, the tax which remains on the commodity, and which, therefore, to that extent diminishes the income to be derived from it, *i. e.*, its rental value, must also proportionally diminish its capital value. The selling or capital value of anything is always the capitalization of the actual and prospective rental or income value. As a consequence, through this familiar principle of capitalization, the new purchaser of the commodity will buy it at the reduced price, and will thus virtually buy himself free from taxation. The tax is discounted, or absorbed, in the new and lower price.

A new tax on city real estate, for instance, will either be diffused by increasing the rents of the tenants, or it will be absorbed in the sense that when the property changes hands the new purchaser will pay a price reduced by the capitalization of the tax.

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The combination of the diffusion and the absorption theories of taxation explains several things. It explains why the theoretic distinction between direct and indirect taxes based upon the alleged facts of incidence is erroneous. It explains why in spite of this theory the great mass of revenue to-day continues to be raised in the shape of indirect taxes. It explains why in countries like the United States the state and local taxes, although still in principle levied on persons, are slowly coming to be imposed on things, rather than on persons; it explains why in France personal taxes have been impossible since the revolution; it explains why in England, with the exception of a single schedule of a single tax, the whole system of taxation is based on things and not on persons; it explains why even in Germany, where the personal and individual elements of the problem have been emphasized in theory, the personal share in actual taxation is so very insignificant; it explains, finally, why the legal decisions on taxation in the United States are coming to be in harmony with the truer economic doctrine of universality and equality of taxation. For this does not mean that everybody must be taxed alike, but only that all the members of a given class must be taxed alike, while there may be the greatest diversity between classes. An equal tax on all corporations does not imply that each individual stock or bond holder who may have bought after the tax was imposed, pays equally, just as little as an equal tax upon real estate implies that each individual land or house owner everywhere and necessarily bears the burden of the tax.

In short, the individual point of view in taxation, which assumes that justice can be done by assessing each individual directly and in first instance, rests upon an analysis suited only to primitive economic conditions. The social point of view is that of modern economics, which seeks to trace the workings of general economic law and to study the forces which affect the distribution of the social income. The individual point of view is not only inadequate in itself, but fails to explain the development of modern taxation. The social point of view, resting upon a combination of the absorption and diffusion

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theories, is alone in harmony with the facts of fiscal life. It is safe to predict that when once this is accepted, the most fruitful work of the future in the science of finance will consist in the elaboration in detail of the conditions and the limits of the absorption and diffusion theories.

IV

Regarded from this point of view, a new light is thrown on the practical problems throughout the world. The most important of these pressing problems are as follows: First, the reform of so-called indirect taxation. The social consequences of indirect taxation are now recognized to an ever-increasing extent. So far as taxes on consumption are concerned, it is fairly well appreciated that the commodity taxed must possess the mingled qualities of a necessity and a luxury; if it possess only the characteristics of a luxury the revenue will be insignificant; if it possess only the qualities of a necessity it will fall with undue severity on the modest consumer; if, however, it combines both characteristics, namely, that of wide use and at the same time that of a certain degree of dispensability, the revenue is apt to be large and elastic and the burden not too severe. The number of consumable commodities that unite both these characteristics is small, and hence we find everywhere throughout the civilized world the tendency to restrict taxes on consumption to very few but very lucrative articles.

In the second place we find well-nigh everywhere the abandonment of the old general property tax regarded as a personal impost. In England and Germany it disappeared during the eighteenth century; in France it was abolished by the revolution; in America, where the economic conditions brought it into life during the eighteenth and the early part of the nineteenth centuries, it is beginning to break up in those sections where the agricultural economy is giving way to a commercial and industrial economy.

Thirdly, we notice everywhere the replacing of the general property tax by taxes on the thing rather than on the person. In the local tax on real estate, this process has been carried almost to completion. In Europe, for instance, the taxes

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levied on the land and on the house are assessed irrespective of the owner or of the relations that may be entered into between owner and tenant. Everywhere in Europe the tax is a tax on the produce of the land or house—that is, upon what it yields in the shape of rent or of profits equivalent to rent. In some countries, as in England, the tax is not paid by the owner at all, but by the occupier. Even in the United States the tax is assessed on the parcel of real estate and not on the individual who owns it. Whether the owner or someone else pays the tax is immaterial, and if the tax is not paid, no regard is paid to the owner and the land itself is sold. We could get scarcely further away from the old idea of individual taxation. The tax is a tax on the thing and not on the person.

In the other so-called direct taxes, a similar development is to be observed. The business taxes in Europe are levied upon the business as such and not upon the owner of the business. The inheritance tax is levied upon the inheritance and not upon the individual who receives the inheritance. The general land tax in England—the last vestige of the mediæval general property tax upon individuals—has actually become a redeemable rent charge. Even the income tax, which in theory is assuredly personal, has, as we have already stated, almost completely lost its individual character and has become, in great measure, a tax upon the thing affording the income rather than upon the person receiving the income. In the United States the so-called personal tax, that is, the tax on individuals according to their personal property, is fast becoming a farce in all the older centers. It is especially noteworthy that in the one place where a recent intelligent effort has been made to reform the personal property tax—the city of Chicago—it is becoming in effect a tax upon the thing rather than upon the person, and is being limited to the business capital, assessed upon groups or classes of business men rather than upon the individuals composing the classes. The problem is really a deeper one than the German scientists have usually recognized. It is not so much a conflict between a tax upon produce and a tax upon income as it is a conflict between the social and the individual bases of taxation.

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In the fourth place, we find everywhere an increasing importance attached to corporations as the source of revenue. In Europe this process is somewhat concealed because of the inclusion of the revenue from corporations in the income tax, just as in many of the younger American commonwealths the revenues figure in the general property tax. In the older states corporation taxes are put into a separate category and in some states as in New York, they are even called indirect taxes in contradistinction to the direct or property taxes. Everywhere, however, they form a problem of increasing importance and present an admirable example of what is meant by taxation from a social rather than from an individual point of view. Taxation of the corporation does not mean taxation of the security holder who has purchased the stock or bond from the original holder.

The main outlines of the development of the immediate future, throughout the world, are thus fairly clear. Each country will continue to have its particular problems based upon its special economic and political needs. Everywhere there will continue to be an attempt to realize the principle of fiscal justice, interpreting it, however, more and more from the point of view of social interrelations rather than from that of individual conditions. The statesmen and scientists alike will find the great difficulty of the future to consist in attaining this due proportion between the undoubted needs of the individual and the consequences of his participation in the social group. For we must not forget that while it is necessary to regard the ultimate results of all fiscal policies, the immediate results are often of primary practical importance. The conflict between immediate and ultimate results is another way of putting the contrast between the individual and social aspects of finance. To realize the truth contained in the latter, without disregarding the legitimate importance of the former, is the problem reserved for the coming decades.

EDWIN R. A. SELIGMAN.

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CHIEF JUSTICE JEFFREYS AND THE LAW OF TREASON

AS a result of the bitter partisan struggle between the two rival political factions, which took place in England during the years just preceding the Revolution of 1688 and which had very frequently for its scene of action the courts of the realm, few names have been overwhelmed with a greater measure of obloquy than that of the Lord Chief Justice and later Lord Chancellor Jeffreys. Contemporary writers, especially those of the opposite party, are violent in their denunciations of the judge, while he has fared little better at the hands of historians of a later day. As chief justice, Jeffreys presided at a number of trials which were of a political nature, and his actions during these proceedings have brought down upon him almost unlimited censure. Sir John Hawles, solicitor general during the reign of William III, in speaking of the case of Algernon Sidney, who was arraigned before Jeffreys on a charge of treason for complicity in the Rye House plot, asserted that almost all the circumstances of the trial were original, in that they rested on the authority of no previous rulings; and this statement, strengthened as it was by the unenviable reputation which later fastened upon the lord chief justice, has in many quarters received general acceptance. The conviction of Sidney has been denounced as a judicial murder, while it has also been declared that it was obtained by an utter disregard of the demands of justice.[1] The decisions of Jeffreys, not only in this case, but also in those of other offenders brought before him on charges of treason, have been said to be illegal, unjust and without precedent.

An investigation of the question must take into consideration the elasticity with which the law relating to treason was interpreted prior to the Revolution. The great statute of treasons

[1] Macaulay, History of England, i, 211, 353; Hallam, Constitutional History of England, ii, 433; Hume, History of England, vi, 272; State Trials, ix, 1004.

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was that of 25 Edward III, enacted in 1352. Before that time the crime had never been clearly defined, and almost any offense which touched the faith and allegiance due to the king could be prosecuted under that head according to the common law. Hale cites a number of cases, showing the range of offenses covered by the charge of treason before this act became law. Accroaching royal power was one of the most frequent accusations, and was alleged against both the Spencers and Roger Mortimer. Killing a messenger of the king or one of his men sent in his aid during a war was in certain cases declared to be treason. John Gerberge, a knight who attacked William de Botelisford and held him until he paid a ransom, was convicted upon a similar charge.[1] That the statute itself was far from complete was shown by the supplementary measures enacted in almost every succeeding reign, and by the numerous judicial constructions which from time to time widened the scope of the law. Thus by the time of the Restoration, though the repeal of the greater part of intermediary legislation left the statute of Edward III as the basis of many of the prosecutions on charges of treason, the interpretation of the law on the subject was guided largely by opinions of legal writers and precedents established in the courts. To these then the question of the legality of the decisions made by Jeffreys during the proceedings against the prisoners brought before him, for example, during those against Sidney, Sir Thomas Armstrong and Lady Alice Lisle, should be referred.

Sidney contested every possible point. Although assisted by an elaborate set of instructions drawn up by friends and handed to him before the trial opened, either the defendant's ignorance of the law or a realization of his critical position caused him to present a number of arguments that could not be sustained. The court decided against him in almost every instance, and this repeated refusal to accept the positions advanced by Sidney has probably contributed not a little to the idea that the prisoner was not treated fairly. When first

[1] Hale, Pleas of the Crown, i, 76–86.

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arraigned, he asked the court that a copy of the indictment and counsel be granted to him. The latter request was too evidently outside of the law to admit even of discussion.[1] No counsel was allowed under the common law in cases of treason; and it was not until the reign of William III that a statute was passed, conferring that privilege upon the prisoner.[2] The lord chief justice explained to Sidney the law on the subject, declaring, however, that if he would assign any particular point of law and the court should think it worth debating, counsel would be granted to him. Sidney did not press the matter. Jeffreys merely followed the law and general practice in this matter; although his private opinion concerning it may be inferred from a remark he made a short time later, while hearing a similar case, to the effect that he thought it a hardship

> that a man should have counsel to defend him for a twopenny trespass, and his witnesses examined under oath; but if he steal, commit murder or felony, nay high treason, where life, estate, honor and all are concerned, he shall neither have counsel nor his witnesses examined upon oath.[3]

As to a copy of the indictment, Sidney insisted that it should be granted to him, citing the cases of Lord Strafford and Lord Stafford and the four other Catholic peers arraigned with the latter, and alleging that such favor had been shown to them.[4] When he was brought into court two weeks later he repeated his request. This time he offered the statute of 46 Edward III, which, he maintained, guaranteed to the defendant a copy of the record. This statute was not applicable to Sidney's case, or to any trial for treason: it plainly related only to those records in which litigants might be interested as affording evidence upon a question of private right and in which the crown might be interested as revealing evidence unfavorable to its fiscal claims.[5] If, however, this statute had

[1] State Trials, ix, 835; see also *ibid.* vi, 516, Twyn's trial.

[2] 7 Wm. III, c. 3. *Cf.* Coke, Institutes, part iii, 29; Foster, Crown Law, 231.

[3] State Trials, x, 267, Rosewell's trial. [4] State Trials, ix, 835.

[5] In the section cited from 46 Edward III, the petition recites that search and exemplification of records have been refused in matters "qe purra chier en evidence

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been construed to extend to Sidney's case, its provisions, like those in many other statutes and ordinances concerning the procedure in trials for treason, would have been abrogated by the statute of 1 Mary, c. 1, which again reduced all to the basis of 25 Edward III, and made such trials conform to the practices of the common law unless otherwise specified. According to the common law no prisoner in any capital case was entitled to a copy of the indictment.[1] Many insisted upon it, but the court at all times denied the request.[2] This rule continued in force until the enactment of 7 William III, which was passed to regulate trials in cases of treason; but between the time of Sidney's trial and the passage of this statute the practice of refusing a copy of the indictment to the accused was continued, notably during the trials of Lord Preston, who also pleaded the statute of 46 Edward III, and of Charnock, King and Keys.[3] As to the case of Stafford and the four other Catholic peers, cited by Sidney, it is true that the House of Lords granted to the accused members copies of the articles of impeachment; but later, when some doubt was felt on the matter and legal advice was sought as to the practice in the king's bench in such a case, the answer was received that no prisoner indicted for a capital offense could have a copy of the indictment without order of the court. The House, however, took no further action in the matter.[4] The same privilege was allowed to Stratford, the Commons having expressed a desire that the defendant should reply to the articles of accusation.[5]

encontre le roi ou desavantage de ly," and the petitioners pray: "qe pleise ordeiner per estatut qe serche et exemplification soient faitz as touz gentz de qeconqe recorde qe les touche en ascun manere, auxibien de ce qe chiet encontre le roi come autres gentz." "Search and exemplification" is not an expression which would naturally be used regarding an indictment. Furthermore, it would not occur to Englishmen of the twentieth century, and far less would it have occurred to Englishmen of the fourteenth, to say that in matters of political law the king was to be treated "like other folk." Least of all would such an expression have been employed or tolerated if the case of treason against the king had been in the mind of the Commons who presented the petition or of the king who granted it.

[1] Foster, Crown Law, 228, 229; Hale, Pleas of the Crown, ii, 236.

[2] State Trials, vi, 173, in Vane's trial; *ibid.* xii, 815, in Ashton's trial.

[3] *Ibid.* xii., 658, 1382. [4] *Ibid.* vii, 1241–1243. [5] *Ibid.* iii, 1385.

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The prosecution proceeded to call several witnesses to prove the general conspiracy, without their being able to give any direct evidence against Sidney. The latter objected to this, asking the lord chief justice if it were customary that witnesses should testify to anything that did not concern him and the indictment.[1] The court cited the trials of those concerned in the Popish plot, where such evidence was admitted. It was the custom generally observed in the English courts at that time. The legal writers of the seventeenth century do not deal very extensively with the subject of evidence, but the records of the trials during that period show that such an objection as the one Sidney advanced had never been sustained by the court.[2] During the trial of Lord Stafford Parliament allowed hearsay evidence to be introduced, and the practice was continued after the Revolution.[3] In 1696 a witness was allowed to testify in direct evidence on only hearsay material against Sir John Freind, who had been arraigned on a charge of treason, notwithstanding the fact that he declared that he had never seen the prisoner and that he could relate only what he had heard from another person. Such evidence was always admitted, the court, however, usually declaring to the jury that it did not directly concern the prisoner. In Sidney's trial Jeffreys was careful to give such a warning.[4]

Before he entered his plea, Sidney wished to put in a bill of exceptions to the indictment, but the court informed him that he must either plead or demur. The prisoner offered his special plea, but he was cautioned that if it were put in and the prosecution should demur and the plea be not good, his life would be forfeited. Then he asked for a day to consider the matter, declaring that he offered the paper only as exceptions to the bill. The court refused all his requests.[5] In this instance also Sidney cited a case in which the precedent was against him—that of Sir Henry Vane. The Court told Vane "that in favor of life a man might plead a double plea, and

[1] State Trials, ix, 841.
[2] Stephen, History of the Criminal Law, i, 399.
[3] State Trials, vii, 1309, *et seq.*
[4] *Ibid.* xiii, 31–32; *ibid.*, ix, 848.
[5] *Ibid.* ix, 820–4.

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give in his exception, and plead over to the felony or the treason not guilty. But as to the exceptions taken to the indictment, they gave little heed to them, but pressed him to plead or confess."[1] The judges at that time declared that the statute of Westminster 2, c. 31, which gave the bill of exception, extended only to civil cases and not to criminal. It was decided that it was never intended as a privilege in proceedings of the latter kind, since no criminal trial could be expedited, "if every frivolous exception which a prisoner could make should be drawn up in a bill of exceptions." The court in Vane's case was unanimous in refusing the request of the prisoner, declaring that the words of the statute could not be misunderstood.[2] This was also the attitude assumed toward Twyn, who, when he was being tried on a charge of treason, was not allowed to say anything until he had entered his plea.[3] Hale says that it was very unusual to take any exceptions to indictments before conviction, and assigns weighty reasons for such refusal.[4]

In the paper which he handed to the sheriff at the time of his execution, Sidney complained that he had been tried by jurors who were not freeholders; and in the act for annulling and making void his attainder the same fact was alleged as one of the reasons for passing such a bill.[5] No such objections appear in the printed record of the trial, and it is asserted that Jeffreys ordered what he thought proper to be struck out of the report, particularly that part of it which related to the contention of the accused that the jury should be composed of freeholders.[6] The lord chief justice may have taken such action, but it is difficult to explain it on the assumption that he feared that the decision of the court on this point might be regarded as illegal. For the same question had been debated in Lord Russell's trial only a short time before, and the arguments of counsel on both sides, together with the opinions of

[1] State Trials, vi, 143.

[2] Kelyng, Crown Cases, 15; Coke, Institutes, part ii, 425–427.

[3] State Trials, vi, 515.

[4] Hale, Pleas of the Crown, ii, 237.

[5] State Trials, ix, 916, 997.

[6] *Ibid.* ix, 865, note.

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the justices who presided, appear in full in the report of the proceedings. In that instance the Lord Chief Justice Pemberton, who was considered to have conducted the trial in an impartial manner, declared, with the unanimous consent of the other judges,

> that in cases of treason or in cases of felony at the common law they had no liberty to except to jurors that they had not any freehold; but that at the common law any good and lawful men might pass. Then take as introductive of a new law the statute of Henry V. I am of the mind that this statute of Henry V peradventure may extend to treasons and felonies; but when the statute of Queen Mary comes and says, all trials shall be by such evidence and in such manner as by common law they ought to have been, I do not see how it is possible to make an objection afterwards of this nature.[1]

With such a precedent as this before him, it is difficult to understand why Jeffreys should have been averse to the publication of his decision against Sidney's objections. This opinion delivered in Russell's case was upheld later by Hawkins.[2] Sir James Stephen says that the whole question was in an uncertain state, and that it was not settled definitely until the Bill of Rights was passed during the reign of William and Mary.[3]

Sidney was indicted on the first article of the statute of 25 Edward III, for "conspiring and compassing the death of the king." This was the treason laid in the indictment, while the three overt acts alleged against the prisoner were: conspiring with the council of six, sending Aaron Smith into Scotland to procure aid for the plot, and writing the treasonable pamphlet found in his study. On the first point Sidney argued strongly that conspiracy to levy war was not treason, since the statute made mention only of levying war, and even that was not contained in the clause on which he was indicted. The language of the statute, in so far as it relates to the points under discussion, is as follows:

> Whereas divers opinions have been before this time in what case

[1] State Trials, ix, 591. *Cf.* Coke, Institutes, part iii, 27.

[2] Hawkins, Pleas of the Crown, ii, 216, 416 [?].

[3] Stephen, History of the Criminal Law, i, 412; 1 Wm. and M., 2, c. 3.

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treason shall be said and in what not, the king, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth; that is to say, when a man doth compass or imagine the death of our lord the king or of our lady his queen or of their eldest son and heir; or if a man do violate the king's companion or the king's eldest daughter unmarried or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm or elsewhere, and thereof be provably attainted of open deed by the people of their condition . . .

all such offenses shall be regarded as treason. The statute then proceeds to speak of counterfeiting, murdering the king's officers, forfeitures, petit treason, constructive treason to be determined by the king and Parliament and certain felonies which are not to be regarded as treason. Nothing is said of conspiracy to levy war, and Sidney, relying upon that fact, repeated in his address to the jury the assertion that such a conspiracy, without having been carried into effect, was not treason under the statute.[1]

The words "compass and imagine," however, have always received a wide interpretation from the courts in cases of treason. As Hale explains them,

they refer to the purpose or design of the mind or will, though the purpose or design take not effect. Compassing or imagining singly of itself is an internal act, and without something to manifest could not possibly fall under any judicial cognizance but of God alone; and therefore this statute requires such an overt act as may render the compassing or imagining capable of a trial and sentence by human judicatories.[2]

Conspiring to levy war was usually held to be such an overt act, and Jeffreys was merely following such decisions and the opinions of legal writers when he instructed the jury that Sidney's contention had no weight. The prisoner quoted from Coke and Hale, and it is true that certain passages from these authorities seemed to give some color to what he said. However, Sidney failed to realize that this defect of the statute had been remedied from time to time by special legislation and even more effectually by "judicial constructions which made

[1] State Trials, ix, 867, 877, 888.

[2] Hale, Pleas of the Crown, i, 107.

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the conspiracy to levy war an overt act of imagining the king's death." Foster interprets the law in the same way.[1]

Such was the decision made in Vane's case, when it was resolved by all the judges, "that the meeting together of persons, and consulting to destroy the king was of itself an overt act to prove the compassing the king's death."[2] Sir John Kelyng declares even more plainly, in the case of the Yorkshire rising, that it was agreed, as it had been previously at Tong's trial and at that of Vane,

> that the meeting and consulting to levy war is an overt act to prove the compassing the king's death within the statute of 25 Edward III. Although the consulting to levy war is not actual levying within the statute, and so cannot be indicted thereupon for that treason of levying war, yet if they be indicted for the treason of compassing and imagining the king's death, that consulting to levy war is an overt act to prove that treason, although Coke *Pl. Cor.* 14 delivers an opinion against this.[3]

Coke does say that a conspiracy to levy war is not treason within the act of Edward III, and that therefore it is no overt act or manifest proof of compassing the death of the king within the act, but the weight of numerous decisions and the authority of the opinions of other writers are against him.[4] Hale says that a conspiracy or compassing to levy war is not a levying war within the act, which was not claimed by the prosecution in Sidney's case; but in another place, speaking of the same question, the author asserts that

> whether the assembly were greater or less or armed or not armed, yet if the design were directly against the king, as to do him bodily harm, to imprison, to restrain him or to offer any force or violence to him, it will be treason within the first clause of compassing the king's death, and this assembling and compassing or practicing together to this purpose, though of but two or three, will be an overt act to prove it.[5]

In other places he repeats the same opinion.[6]

[1] Foster, Crown Law, 197; Stephen, History of the Criminal Law, ii, 266, 282.
[2] Kelyng, Crown Cases, 17. [3] *Ibid.* 20. [4] Coke, Institutes, part iii, 14.
[5] Hale, Pleas of the Crown, i, 151. [6] *Ibid.* i, 110, 119, 133.

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This position was reaffirmed by the Lord Chief Justice Holt in 1696, during the trial of Sir John Freind. He went even farther, declaring that although bare conspiracy to levy war was not treason, yet if it had for its object either to kill, depose or imprison the king, or to put any restraint upon him, it would then amount to high treason, even though no war be levied. For such consultation becomes an overt act which proves the first treason mentioned in the statute of Edward.[1] Other authorities repeat the same opinion, and later it was upheld by the courts in numerous instances.[2]

Viewed in this light, the testimony of Lord Howard as to the participation of Sidney in the consultations of the council of six may fairly be regarded as that of one of the two witnesses required to convict a man of treason. He also testified as to the prisoner's part in the sending of Aaron Smith into Scotland. To secure the other witness the prosecution took up the matter of the pamphlet which had been found on a table in the defendant's study at the time of his arrest. The writing of this document, a polemical treatise on government, said to have been intended as an answer to Sir Robert Filmer's *Patriarcha*, was alleged by the crown as the second overt act to prove the treason with which the defendant was charged. Sidney declared during the trial that it had not been proved that he had written the treatise, and that even if it had, the writing of it could not be accounted a crime.[3] His first contention, however, rested on no good foundation, even though it was given as one of the reasons for reversing his attainder later.[4] The records of the trial show that the handwriting of the document was proved by three witnesses: Sheppard, who had seen Sidney write the endorsement upon several bills of exchange, and Cary and Cooke, both of whom were familiar with the handwriting of the prisoner.[5] Despite Sidney's protest, this was evidence which was at that time and would be also at the present day regarded not only as admissible but as conclusive. Such evi-

[1] State Trials, xiii, 61.

[2] Foster, Common Law, 195, 210, 211; Blackstone, Commentaries, iv, 82; Holbourne, Readings on 25 Edw. III, 28, 29.

[3] State Trials, ix, 867. [4] *Ibid.* ix, 997. [5] *Ibid.* ix, 854.

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dence was admitted later during the trials of Layer, Dr. Hensey and Francia. In the case of the latter the court declared that it was sufficient to prove the defendant's handwriting if the witness swore he had seen Francia write for an hour at a time and then upon the trial testified that he believed that the document produced was in his hand.[1] Sidney's implied denial of authorship was not strengthened by his assertion that the condition of the manuscript showed that it had been written twenty or thirty years before. Internal evidence, such as the mention made of recent events and the names of contemporaries, together with the frequent references to Filmer's book, which was published first in 1680, prove a much later origin for the pamphlet than that assigned by the accused.[2]

The question whether the writing of such a pamphlet was an overt act to prove the compassing of the king's death is one that has occasioned considerable debate. The precedents are not clear on the subject, and some writers criticise the interpretation which Jeffreys put upon the maxim, *scribere est agere*. Foster says that it is undoubtedly true under proper limitations, and acknowledges that, had the papers found in Sidney's closet been plainly relative to the treason charged in the indictment, they might have been admitted as evidence against him even if they had not been published. He cites the cases of Lord Preston, Layer and Dr. Hensey, in which papers were read in evidence of overt acts of treason. Here, however, the papers were written in prosecution of certain determinate purposes which were assuredly treasonable, were then in contemplation of the offenders and were plainly connected with them. This, the writer thinks, could not be said of the pamphlet found in Sidney's study.[3]

The decision seems to depend on the attitude which is taken toward the rights of the crown. Those prerogatives which the government sought to defend in the conduct of its case against

[1] Stephen, History of the Criminal Law, i, 410; State Trials, xv, 922; *ibid.* xvi, 205; *ibid.* xix, 1342.

[2] State Trials, ix, 866, 901; Sidney, Works, ed. 1772, pp. 1, 52, 165, 222, 366.

[3] Foster, Crown Law, 198; State Trials, xii, 711 *et seq.*; *ibid.* xvi, 208 *et seq.*; *ibid.* xix, 1342, 1373.

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Sidney, and in similar proceedings in the the courts just before the Revolution, found few champions after 1688. The section of Sidney's pamphlet read in evidence showed that it exalted the power of the Parliament over that of the king, asserted the responsibility of the monarch to the people, and reserved to the latter, in case the trust was betrayed, the right of resistance.[1] Whether this conception was historically correct or not, it was certainly not the one entertained by the government of Charles II. Hence, it was only natural that the writing of such a pamphlet should be regarded as an attempt to put restraint upon the king, and that as such, taken in connection with the conspiracy to levy war, it should be put forward as an overt act of treason.

As to the connection between the pamphlet and the plans of the council of six, this was referred to by Jeffreys in his charge to the jury,[2] although the chief justice, evidently not considering that the proof of such a fact was essential, did not say in so many words that it had been intended to use the document as a justification of the proposed rebellion. Lord Howard, in his testimony against Sidney, stated clearly that the council had resolved to declare the principles on which the rising was to be based. These followed closely the line of argument in the document. The properties and liberties of the people were to be put into such hands that they could not easily be invaded by any to whom the supreme authority of the land was entrusted. It was proposed to resolve all into the authority of the Parliament. There was some opposition to this revolutionary plan, but in the end all six members of the council agreed to it.[3] West also, in his testimony, said that when negotiations were being carried on with the Scotch, the English were for a commonwealth. The representatives of the northern country

[1] State Trials, ix, 855–858.

[2] "This book . . . fixes the sole power in the Parliament and the people; so that he carries on their design still, for their debates at their meetings were to that purpose. And such doctrines as these suit with their debates; for there a general insurrection was designed, and that was discoursed of in this book and encouraged . . . Because he is afraid their power alone won't do it, he endeavors to poison men's judgments." State Trials, ix, 893.

[3] *Ibid.* ix, 851.

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answered that it might come to that in time, but that at present the Scotch nobility would not agree to it. Sidney, in particular, was instrumental in causing the negotiations to fail, which the witness declared was due to the fact that an agreement could not be reached on the declaration to be made concerning the insurrection.[1]

In several earlier cases words had been held to be overt acts of treason, and when written furnished even stronger ground for such a claim.[2] This was so decided in the case of Williams, a barrister of the Middle Temple, in 1620. He was indicted for high treason for writing two books, in one of which he assumed the rôle of a prophet and predicted that the king would die in the following year. The book contained a number of harsh criticisms of the king. Williams in his defense alleged the matter had remained only an opinion or thought and had not led to any overt act, since no rebellion or treason had resulted from it; that he had enclosed the book in a box and sent it secretly to the king, and that he had never published it. The court refused to sustain either of these points. It declared that the matter could not be said to remain in thought, when it was reduced to writing, for *scribere est agere*. This was the first time the law had been declared so plainly on this point. The court went even farther, agreeing that though the book was enclosed in a sealed box or was in the writer's study, nevertheless since his intent was made evident by this act it was high treason. As a result Williams was found guilty and executed.[3]

In this case there was no suggestion of a conspiracy, such as was proved against Sidney, but the decision was rendered by the judges on the question of the book alone. A modern writer on evidence says, without citing any proof, that Sidney's pamphlet was unconnected with the treasonable practices of which he was accused; he acknowledges, however, and in this he but follows earlier authorities, that had such a connection

[1] State Trials, ix, 847.

[2] Kelyng, Crown Cases, 13; Hale, Pleas of the Crown, i, 115; Coke, Institutes, part iii, 14.

[3] Rolle, Reports, ii, 88; Croke, Reports, iii, 125.

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existed, the papers, even though unpublished, would have been admissible.[1] Roger North, on the contrary, writing as a contemporary, says that "it was understood" that the pamphlet was to have been published in justification of the rebellion.[2] According to the record of the trial the prosecution made no attempt to prove such a fact; nevertheless, this view concerning the relation between the pamphlet and the conspiracy would certainly not be inconsistent with the testimony of Lord Howard in regard to the plans of the council of six and with the words used by the lord chief justice in his charge to the jury.

An unpublished document was admitted in evidence during the trial of Edmund Peacham, in 1615, but here again there was no suggestion of a conspiracy with which it could be connected. The prisoner, an aged minister living in a remote place, was charged with writing a treasonable sermon, which was found in his study.[3] The report of the case, which is very brief, says that the sermon was never preached nor intended to be preached. Nevertheless, Peacham was convicted, but he was not executed, his death occurring in jail seven months after his trial. While a note appended to this meager account says that many of the judges were of the opinion that it was not a case of treason, the correspondence of Sir Francis Bacon with the king throws some additional light on the matter. Bacon, who was at that time attorney-general, was instructed by James to sound the opinions of the judges of the King's Bench. The answers of three of them, Justices Dodderidge, Crook and Houghton, were satisfactory, but Chief Justice Coke expressed doubt concerning the matter. He asserted that Peacham's writing had never been published, and that even if published, mere slanders against the king were not treason, unless they attacked his title. Coke was strongly opposed to the practice of obtaining the opinions of the judges separately on a case, and it is probable that this had as much to do with

[1] Taylor, Law of Evidence, i, 529; Phillipps, Law of Evidence, i, 485, 486; 1 East, Pleas of the Crown, i, 119; Foster, Crown Law, 198; Blackstone Commentaries, iv, 80.

[2] North, Examen, 409.

[3] Croke, Reports, iii, 125; State Trials, ii, 869.

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his attitude in the matter as his view of the actual merits of the question. He stood out against the government on this point for some time, and it required all of Bacon's persuasive powers to win him over. His hesitation probably was responsible for the report spread abroad that some of the judges doubted whether it was a case of treason; and Bacon, when he learned that this rumor was being circulated, preferred to have it supposed that the doubt was occasioned by the fact that the document had never been published rather than by the nature of its contents. Should the latter view gain currency, Bacon feared that a flood of libels against the king might follow, while by alleging the other reason he felt that no harm would be done, since this lack of publication, he declared, would be no man's case in the future. If lack of publication were the reason which prompted the misgiving of the judges as expressed in the note attached to the report of the case, it was one that was not accepted later by the courts, since publication has never been held essential to make a written document treasonable. Even at that time it could have had little weight, for the record of Peacham's conviction remained, and King James himself, in commenting on the case, declared that the judges had acknowledged that the prisoner's writing of the libel was an overt act. All the circumstances would seem to show that the note is not trustworthy, and its declaration fails to destroy the value of Peacham's case as a precedent for the decision made against Sidney. Only one of the four judges expressed any doubt as to the guilt of the accused, and the evidence indicates that Coke's principal objections were based on grounds other than the lack of publication of the document in question.[1]

In the case of Twyn, a printer charged with publishing a treasonable book, no conspiracy was alleged, but the prisoner was found guilty and executed. Twyn was not accused of writing the book, nor was the publication completed, only about one thousand loose sheets of a portion of the manuscript having been printed and delivered to the writer. Some of the printed sheets found in the prisoner's workshop were produced

[1] Gardiner, History of England, ii, 272–283; State Trials, ii, 871 *et seq.*

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at the trial as the principal evidence against him.[1] Even at a later period, during the trial of Ashton, treasonable papers found on the person of the prisoner were regarded as an overt act, although it was not alleged that he had written them.[2]

Sidney's argument that the two witnesses necessary to secure a conviction for treason had not been produced against him, because they had testified to different overt acts, had even less foundation than some of the other points he advanced. All precedents and opinions were against this contention; one witness to prove one overt act and a second to prove another overt act tending toward the same treason had been regarded as sufficient within the statute.[3] It was probably this fact which made the prosecution regard the proof of a direct connection between the conspiracy to levy war and the writing of the pamphlet as unnecessary. They were overt acts to prove the same treason, that is, compassing and imagining the king's death, and each was supported by the testimony of one or more witnesses.

In connection with the proceedings against Sir Thomas Armstrong in the king's bench in June, 1684, upon an outlawry for high treason, Jeffreys has been accused of treating the prisoner in a most arbitrary and unjust manner. Armstrong, who had been charged with complicity in the Rye House plot, had fled from the country upon its discovery, but, after being outlawed, had been arrested by an agent of the government in Holland and returned as a prisoner to England.[4] When brought before the lord chief justice he claimed the benefit of the eighth section of the eleventh chapter of the statute of 5 and 6 Edward VI, by which it was provided

> that if the party so hereafter to be outlawed shall, within one year next after the said outlawry pronounced or judgment given upon the said outlawry, yield himself unto the chief justice of England for the time being and offer to traverse the indictment or appeal whereupon the

[1] State Trials, vi, 513 *et seq.* [2] *Ibid.* xii, 747 *et seq.*

[3] Kelyng, Crown Cases, 9; Foster, Crown Law, 237; State Trials, vii, 1527, 1528, in Stafford's trial.

[4] State Trials, x, 105 *et seq.*

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said outlawry shall be pronounced as is aforesaid, that then he shall be received to the said traverse, and being thereupon found not guilty by the verdict of twelve men he shall be clearly acquitted and discharged of the said outlawry.[1]

Armstrong had been arrested within the year, but Jeffreys would not admit that he had "yielded" himself within the meaning of the statute, maintaining that he had been captured and had not surrendered voluntarily to the court. There appears to have been no direct precedent for such a decision, and Jeffreys' action has not been sustained by later judges, notably in the case of Roger Johnson, cited twice in Ratcliffe's case.[2] It has been said, however, that the chief justice was technically in the right, the injustice being in the assumption that Armstrong would not have surrendered within the year rather than in the construction put upon the wording of the statute.[3] One case in which the word "render" or "yield" was interpreted in a sense different from "taken" has been cited as occurring prior to this decision of Jeffreys, although it has been denied that it was analogous to the proceedings against Armstrong. It was that of Smith against Ashe and his wife, reported by Croke, in an outlawry for debts against husband and wife. In this instance the judges made a plain distinction between the case where the exigent was returned by the sheriff "*reddidit se*" for both defendants and that in which one of them had not come voluntarily into court.[4] After Jeffreys had decided the point against Armstrong the latter asked for counsel to argue the question, but the chief justice refused the request. This was undoubtedly severe, and yet, considering the nature of the point in dispute and the lack of law on the subject, it is almost certain that nothing any counsel would have been able to offer could have altered the opinion of the court.

While too remote to be cited as having any direct influence on the case, the old Germanic conception of outlawry, which persisted on the Continent throughout the middle ages, was

[1] 5 Statutes at Large, 373.

[2] Foster, Crown Law, 46.

[3] Pike, History of Crime in England, ii, 245.

[4] Croke, Reports, iii, 58; State Trials, x, 124.

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such as to furnish a possible historical basis for this interpretation of the statute. Outlawry was not only a penalty imposed upon an offender after trial, it was also a method of procedure by which the court brought force to bear to secure the appearance of an accused person. It was imposed upon the accused who failed to present himself in court; and its result was that the accused, if seized and brought into court, was without defense. He was treated precisely like a criminal taken in the act, and was liable to conviction on the oath of the accuser supported by compurgators. Of this nature was the minor outlawry (*vesting*) of the Saxon law, which differed from full outlawry only in the fact that its operation was restricted to a single judicial district. If the *vervest* man was taken within the jurisdiction, the proceedings against him were identical with those against the man taken in the act. The *vervest* man, however, had this advantage over the man taken in the act, that by surrendering himself to the court he recovered his rights of defense; but the surrender must always be entirely voluntary on his part. That only the uncaught man could come before the court and claim his law, as if he had never been *vervest*, is shown by the provision in the *Sachsenspiegel*, according to which the person who wishes to draw himself out of the *vesting* intercedes through a friend to have the judge "work peace" for him to come forward, and thus avoids the risk of capture while on the way to court to surrender himself.[1]

The question as to whether a person accused of harboring a traitor could be convicted before the latter had been found guilty or attainted came up before Jeffreys during the trial of Lady Alice Leslie. He decided it in the affirmative. The jury, which evidently had some doubt on the subject, inquired whether it was the same thing in point of law for the prisoner to have received Hicks, a refugee from Monmouth's army, before he was convicted of treason as after. The lord chief justice replied that there could be no doubt about it. He declared further that had Hicks "been wounded in the rebels' army and had come to her house and there been entertained,

[1] Sachsenspiegel, i, art. 66, secs. 1, 2; art. 68, sec. 5; ii, art. 4. *Cf.* Schröder, Lehrbuch der deutschen Rechtsgeschichte, 85, 703, 704, 713–714.

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but had died there of his wounds, and so could never have been convicted, she had been nevertheless a traitor."[1] This was based on the doctrine that in cases of treason there are no accessories, but all are principals.[2] However, Hale in another place differentiates between the traitor and one who harbors him, to the extent of declaring that the latter shall not be made to answer for his offense until after the former has been outlawed, or at least must be tried jointly with him. In the latter case the same jury may be charged with both trials, but the guilt of the principal should be inquired intō first. The author fails to cite any authorities for his opinion and introduces it by the phrase, "it seems to me." Subsequent writers uphold Hale's opinion.[3]

When Jeffreys made his decision, however, Hale's work on the subject had not appeared, while the other opinions are of still more recent date. The law of treason was always interpreted in the most severe manner against the accused, so that, notwithstanding the act of Parliament reversing Lady Lisle's attainder and the opposing opinions of later writers, Stephen says that in this instance Jeffreys, on the mere point of law, was in the right.[4] In the trial of Mrs. Gaunt, arraigned a short time afterward on a similar charge, the man she was accused of harboring was admitted as the principal witness against her. It is true that his name was in a proclamation, but the prosecution failed to prove that the prisoner knew this, she merely saying that she "might" have heard it.[5]

The whole question of the crime of treason was in an indefinite shape, or rather in such an elastic shape that it could be extended to meet in a legal manner almost any need of a government bent on maintaining prerogative. The unde-

[1] State Trials, xi, 371.

[2] Coke, Institutes, part iii, 138; Hale, Pleas of the Crown, i, 233; Foster, Crown Law, 341.

[3] Hale, Pleas of the Crown, ii, 225; Foster, Crown Law, 345; East, Pleas of the Crown, i, 101.

[4] Stephen, History of the Criminal Law, ii, 234.

[5] State Trials, xi, 413 *et seq.*

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veloped state of court procedure and the existence of numerous precedents in which the law had been strained against the prisoner, especially in cases of treason, obviated the necessity of a judge acting in an illegal manner toward the accused. Jeffreys, it would seem, followed the line of action laid down in previous rulings, and if the judgments which he rendered were not upheld afterwards, the cause is to be found rather in the change which occurred in the government's conception of what constituted the crime of treason than in the illegality of his decisions.

No attempt is here made to rehabilitate the name of Jeffreys. It would be as useless to try to defend his private character or political opinions as to inveigh against his violence and his cruelty; but an unprejudiced examination of his decisions on the bench shows that as a rule they were strictly within the limits of the law, and that he was but a conspicuous example of the English justices of the Restoration rather than a judge exceptionally cruel and unjust, as he has been so often pictured. The men who dispensed the king's justice during that period and earlier in the century were but a reflex of the world in which they lived. Violent and denunciatory language was customary from the bench and bar, and may be read on almost every page of the court records. Jeffreys' bold and aggressive manner undoubtedly accentuated these disagreeable characteristics, long since repudiated by a more refined and sympathetic age; but his decisions on the bench and methods of procedure generally were the natural outcome of the previous and contemporary conditions of the English legal system.

D. L. PATTERSON, JR.

COLUMBIA UNIVERSITY, MAY, 1904.

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BRITISH ADMINISTRATION AND IRRIGATION IN EGYPT

IT was no Machiavellian policy but the logic of fate that two and twenty years ago established British power in Egypt. The position of Egypt on the high road to India, the maritime supremacy of Great Britain and her large interests in the country had long, it is true, pointed her out as the natural protecting power; but any such policy of interference was wholly distasteful to her rulers. When towards the close of Ismail's reckless and extravagant reign it became evident that foreign intervention was inevitable, they wished to persuade France to undertake the task. The revolt of Arabi and the massacres at Tanteh and Alexandria finally brought about a military occupation. France, not liking the prospect, had withdrawn. The battle of Tel-el-Kebir was followed by the occupation of Cairo, and amid a chorus of protests from her statesmen that the occupation was of a purely temporary character, Great Britain entered upon her task of regeneration in Egypt.

The protests were genuine enough. The British government hoped that a few months would suffice to restore order, set up a decent semblance of native government and withdraw. The state of Egypt was a byword for hopelessness. She was saddled with a debt of over £100,000,000, for most of which there was nothing to show. Her credit was gone; oppression and misrule were universal; life and property were insecure; justice was only another name for extortion and cruelty; extravagant and wasteful traditions were the rule in every department; the agriculture on which the country depended was maintained only by a hideous system of slavery; the whole fabric of government rotten to the core, lay shattered in a thousand pieces. Only the tax-collector and the usurer, working hand in hand, throve and flourished exceedingly; the whole nation, after its brief spasm of rebellion, had fallen back into the apathy of despair. In addition to all this the seeds sown during so many years of misrule in the Soudan were bearing

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their deadly fruit. The Mahdi's rebellion was in full blast; the Egyptian armies, hopeless and disorganized, were being scattered like chaff, and the furious horde of fanatical dervishes were already knocking at the gates of Egypt itself. The problem of administration was far from enticing, but the darker the prospect the more impossible it was to lay aside the responsibility once undertaken.

Unhappily the assumption of responsibility was not accompanied by full freedom of action. The very fact that her occupation was supposed to be merely temporary added immensely to Great Britain's difficulties. Reformers in a country like Egypt are bound to be unpopular at first. Opposition was safe and easy, and an obvious passport to the favor of any future government. The nations of Europe, and especially France, whose influence in Egypt had been paramount since the days of Napoleon, however willing they had been to allow England to enter the hornet's nest single-handed, were very jealous of the fruits of victory. A direct protectorate was impossible, and without it authority could only be exercised indirectly. Without it, too, Egypt remained a part of the Turkish empire, and thereby the system of the capitulations remained in full force. These treaties, concluded in the hey-day of Turkish power, were originally the outcome of the contemptuous indifference of the sultans towards the infidels within their borders. The despised Franks might settle their own paltry affairs among themselves; they were too insignificant to occupy the attention of the true believer. But as the Turks declined and European nations prospered in power and influence, this contemptuous toleration became a valuable privilege. The practical exemption of foreigners from the jurisdiction of the native courts and from national taxation has always been and still is one of the greatest thorns in the side of Egyptian administration. In addition to this, the international constitution of the *caisse de la dette*, of the railway board and other departments gave the rulers of Egypt only a divided sovereignty in their own house. The precautions laid down to secure the interests of the foreign bond-holders tied Egypt hand and foot in matters financial; and as reform usually means some expenditure in

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the first instance, they afforded a ready handle for those who desired, from various motives, to render the task of England difficult if not impossible.

It was no wonder that the British government, alarmed by the already heavy burden of empire, shrank from these new duties and made every effort to redeem its pledges of evacuation. It is a matter of history how even in 1887 Lord Salisbury's government (for the policy of evacuation was not the monopoly of any one party) concluded a convention with Turkey's representative to withdraw in three years' time. The sultan at the last moment, acting under pressure from certain European powers, refused to ratify the convention. Diplomacy is often blind enough, and it was thought, eighteen years ago, that three years was too long a period to concede for the maintenance of the British occupation.

While the head doubted and wavered, as has so often happened before in our history, the hands and feet, that is the men on the spot, acted surely and soundly. The British representative in Egypt was then and still is Sir Evelyn Baring, now Lord Cromer. No happier choice could have been made. By heredity a financier, by training a soldier and by nature a statesman, he had already had official experience in Egypt and had also served as financial member of the council in India, that great nursery and school of administrators to which we owe so much. Success has given him a weight and authority with his countrymen which he did not then enjoy, but then as now he possessed all the essential qualities of statesmanship. To a clear-sighted comprehension of all the facts and a wise judgment he added an unflinching resolution and an admirable patience. His sound common sense was happily blended with imagination. In pursuit of distant ideals he never lost his grip upon the practical, and while he always preferred success in obtaining a small reform to failure in a large one, he never lost sight of the essential outlines of policy. Always ready to listen to new facts, he was free from that common failing of great men, prejudice in favor of his own opinion. Himself an indefatigable worker, he knew how to choose and trust his subordinates. Besides these great qualities he had a most felicit-

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ous gift of expression in writing, and those who have heard one of his rare speeches are aware that he would have made a great figure in any deliberative assembly. Such was the man whose life task it became to shape the destinies of Egypt.

As soon as the new government had settled a little into its seat, it entered into negotiations with the view of raising a loan of a million pounds. For a country already burdened by an enormous debt and face to face with bankruptcy this was a bold and startling step, but it proved that those in power had a sure insight into the necessities of the situation. The million was known as "the irrigation million," and it was to be expended entirely on reproductive works to improve the water supply of the country. In Egypt the first principle of government is the care of the Nile; the great river is the source and giver of all life. In the words of Herodotus, Egypt is the gift of the Nile; the Nile is Egypt and Egypt is the Nile. Without a proper supply and distribution of the life-giving water, the magnificent alluvial soil and the certain climate are of no more value than the sands of the desert. Egypt is a purely agricultural country; its agriculture depends entirely upon its irrigation. No administration unless based upon a sound system of irrigation would be worth more than waste-paper. To build up such a system was rightly perceived to be of the first importance.

Nature had provided Egypt with a simple and easy method of irrigation. Everybody knows the main characteristics of the flow of the Nile and its annual flood. The flood, which is principally due to the torrential rains of Abyssinia, sweeps down the Blue Nile and the Akbara, carrying with it the fertilizing silt from the virgin forests and volcanic soil, and, swelled by the volume of the White Nile, reaches Egypt about the end of July. In a year of good flood the amount of so-called "red" water passing Assouan in August is as much as 14,000 cubic metres per second. All through the winter the Nile, though falling, has still a good supply, but in the summer months the difference is extraordinary. Towards the end of May in an average year the volume of water at Assouan is only about four hundred cubic metres per second, while in a bad year it falls to

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half that amount. That the flow is maintained even to this extent is principally due to the steady supply drawn by the White Nile from those great natural reservoirs, the Sudd country and the equatorial lakes: for the contribution of the Blue Nile falls to very little and the Akbara ceases to flow at all. From time immemorial the whole land of Egypt had been divided by dikes into basins or series of basins varying from 5,000 to 15,000 acres in extent. About August 12 the muddy flood was led by means of short shallow canals into these basins. There it stood for forty days, till it had deposited its burden of silt, and then it was drained off again as the flood fell. Thus every year the soil was renewed; the land was thoroughly washed and cleansed from injurious salts. On the wet soil the husbandman sowed his seed, and the hot sun brought the crop quickly to maturity without further trouble and with the certainty of good harvest weather. The only anxieties were lest the flood should be too low to cover all the land, or lest it should be so high as to prevent the water being drained off at the proper time or even to break through the dikes and sweep away the mud-built villages. In Roman times, before the Mohammedan invasion A. D. 700, the whole of Egypt (6,250,000 acres) was cultivated in this way; but, during the centuries of misrule that followed, as the population decreased, the basins in the northern part of the Delta were allowed to fall into decay; the land became waste and salted; and when Mehemet Ali came as viceroy in 1810 only about half the Delta was cultivated.

To Mehemet Ali is due the great change in the system of irrigation. He was struck with the profits that might be made from the cultivation of sugar and cotton. But these crops need continuous watering; they will not stand complete inundation. He strengthened the dikes that kept out the flood and dug deep canals that would be capable of carrying water from the Nile at even its lowest levels in the summer. The advantages of the new system were obvious enough. With a continuous supply of water all the year round, two or even three crops could be raised instead of one, and those of a very valuable character. But the disadvantages were also great. The land was deprived of its annual washing as well as of the deposit of fertilizing silt,

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and the whole scheme of agriculture was altered. The perennial irrigator was the wealthier man, but his anxieties were also greater. He needed a regular supply of water just when the Nile was lowest; any failure meant the loss of weeks of labor and wasted expenditure. Under basin irrigation a failure of the flood meant that so much land would go uncultivated, but no time or money was spent upon it. What was of greater significance was that irrigation became a far more complicated and difficult science. Highly skilled experts were necessary to regulate and apportion the water supply; only a department of government itself could undertake to reconcile conflicting claims when the water supply was scanty. The Egyptian farmer had to look more and more to government, as other farmers look to Providence. Basin irrigation was a rough-and-ready system founded on nature itself, but the delicate network of deep canals necessary to distribute the water in the summer was very liable to fall into disorder. Under the basin system a failure of the year's flood only meant that the land lay fallow for a time, but a failure of perennial irrrigation meant a permanent disaster.

It is a maxim of perennial irrigation all the world over that when water is scarce its distribution must be managed with skill and also with equal but despotic justice. The Egyptians soon found that they had gained but little from the change. The ministers of Mehemet Ali did not carry out his great ideas with the skill and justice which they demanded for success. Not only were the deep-level canals faulty in slope and alignment, but they were often constructed with more regard for the interests of particular landowners than for those of the country at large. They speedily silted up and had to be annually cleared with enormous trouble. The whole burden of this fell upon the wretched peasantry. It had always been the custom to call out the fellaheen to guard the dikes in the flood time, and the employment of this forced labor, under the name of the corvée, had always been one of the privileges of the government. But now the troubles of the peasants were multiplied a thousandfold. Not only had they to dig the deep canals in the first instance, but they had to clear them of silt. Unpaid,

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unfed, and unprovided with tools, the year was too short for the labors they had to perform. A few powerful proprietors flourished and throve, but the mass of the people, torn from their homes just when their services were most needed there, fell more and more into an abject and miserable slavery. The Khedive Ismail made things even worse. Under him the corvée was called out to dig the Suez canal, and he used the same instrument to construct, in upper Egypt, the great Ibrahimiyah canal, which was designed to give perennial irrigation to his own private estates, most of which had been amassed by despotic methods at the expense of the small proprietors.

The French engineers employed by Mehemet Ali perceived that if the river level could be artificially increased during the summer, it would effect an immense saving of labor in clearing the canals; and with this object they devised the barrage at the point of the Delta to hold up the river. But Mehemet, with all the forced labor at his command, and with his head full of many grandiose ideas, was only fitfully keen about the project, and it was still unfinished at his death in 1848. Not until 1872 was it possible to make any use of the structure, and then only of that portion of it which lies on the Rosetta or western branch of the Nile. As for that on the Damietta branch, no one dared to think of using it at all. At the time of the English occupation the Rosetta barrage managed to hold up one metre of water. Even this had increased the area of summer crops matured from 250,000 acres to 600,000. But so faulty was the work that it was felt it might give way at any moment, and it was the settled policy of the government to rely instead on huge and costly pumping-stations. It was a paltry result for the expenditure of £4,000,000 and so much labor.

Then, not for the first or last time, the Anglo-Indians came to the rescue of Africa. Sir Evelyn Baring summoned from India Colin Scott-Moncreiff with a trusty band of lieutenants, Garstin, Willcocks, Ross, Brown, Foster, Western and Reid. All these men, trained in the great school of Indian irrigation, were possessed of the highest scientific knowledge and skill,

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but they were also animated by a spirit which was better than science. Deep in them lay the earnest wish and determination, far stronger even than their enthusiasm and love for their profession, to alleviate the lot of the unhappy peasantry of Egypt. It was this heartfelt sympathy for the wrongs of the fellaheen, ground down by the intolerable burden of the corvée, that sustained them in their ceaseless labors and enabled them to pass successfully through those dark days, when the air was full of forebodings of failure and disaster, whose fulfilment would have been so agreeable to many of their critics.

The barrage was the kernel of the situation. It would have been much easier to rebuild it completely, but in the bankrupt state of the country this was not to be thought of. The cotton crop had to be supplied while the repairs were going forward; when the flood came down all operations were necessarily at an end. Mr. Willcocks was placed in charge of the work. By a succession of ingenious devices, too numerous to mention here in detail, he succeeded in mending and patching the barrage to such an extent that in 1884 two and two-tenths metres were held up on the Rosetta branch and one metre on the Damietta branch. Next year the same nursing process was continued; three metres were held up on the Rosetta and one and six-tenths on the Damietta branch. Not only was the summer water supply on the Delta canals greatly increased, but it was delivered at a higher level with a great saving of expense in lifting it on to the land. The acreage under summer cultivation rose at a bound from 600,000 acres to 1,200,000. All Egypt stood amazed; for the first time the common people gratefully realized that a new power had come among them. But temporary expedients cannot last forever. The greater the area of summer cultivation, the greater the need for certainty in the action of the barrage. Mr. Willcocks's success sealed the claim of the barrage to a share in the "irrigation million," and during the next four years extensive and permanent repairs were carried out.

The great problem of the barrage was that, with the exception of the revetment wall running across the tongue of land

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which divides the two branches of the river, both sections of it were built on the shifting sands of the river-bed, which afforded no foot-hold for masonry works. In each case the bed of the river had to be filled up with rough stone-work, and on the top of this, but still under water, a broad platform or floor was laid down reaching from bank to bank. On this foundation rose the bridge of arches containing the sluice-gates, which could be raised or lowered as required. The brick-work of the arches was sound enough, but the underlying floor was very faulty. Section by section it was now laid bare by means of earthen dams and recased in a new and reliable suit of armor. The sluice-gates were also replaced by a new pattern. Each portion of the work had to be finished and made secure before the annual flood came down and put a stop to all operations. By 1889 the repairs were finished; and so successful were they that it was found possible to hold up still another metre, and the area of summer crops matured rose once more to 1,520,000 acres. Both in 1891 and 1892, years of exceptionally low summer supply, the whole available water in the Nile was diverted into the canals, and not a drop reached the sea without having done duty in the fields.

It was clear that the barrage was now equal to all demands that might be made upon it, but the engineers wished to make security doubly secure. Moreover, the prospect of an increased supply by means of an artificial reservoir had become a question of practical politics, and in view of this it was desirable to leave no precaution untaken. In 1886–89 the original platform had been overlaid and strengthened, but its interior was known to be full of cavities of uncertain extent. In 1897–98 an ingenious device was adopted. Five holes were bored in each pier of the barrage, right into the bottom of the structure, and into each hole was poured a quantity of liquid Portland cement till it would take no more. Portland cement has the remarkable property of solidifying under the action of water into a substance whose hardness and resisting power are enormous. The cement thus introduced penetrated into every hollow and cavity of the foundation and welded the whole into a solid mass. How much this invigorating tonic was needed was shown

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by the fact that the Rosetta barrage alone swallowed 3,254 barrels of the mixture. Finally, downstream of each section of the barrage a solid dam was laid down, blocking the course of the stream up to such a height that the difference between the upstream and downstream level of the barrage when the gates were closed was reduced from four metres to two and a half. This had the effect of immensely reducing the pressure on the barrage itself without impeding the river in flood, which could pass freely over the top of these dams or weirs. The sluice-gates were at the same time heightened, so that altogether the combined works can hold up five metres of water.

The work of the irrigation department in the Delta was by no means confined to the barrage itself. By degrees the whole system of canals was remodeled and above all, an immense number of new drains were laid out, for when water is delivered at a high level it is only less important to get the water off the land than to get it on, in order to avoid waterlogging and salting. With these improvements the economic results of the restored barrage was extraordinary. For the moment one instance will suffice. Up till 1900 the summer supply of 1878 had been the lowest on record. It is still remembered in Egypt as a year of black disaster. The river level at Assouan sank to 71 centimetres below zero on the gauge. But in May, 1900, on three separate days the gauge recorded a level of 98 centimetres below zero. Yet, in spite of this, so perfect was the system that it was found possible not only to save the crop, but also to secure a yield which a few years earlier would have seemed a miracle. Stringent regulations had of course to be laid down as to the use of the water, and a special staff was appointed to see that they were carried out. It speaks well for the good sense of the Egyptians, and it proves their implicit faith in the British engineers, that these regulations were carried out practically to the letter. The cotton crop amounted to 2,250,000 kantars (the kantar equals 100 lbs. nearly), and the maize crop was also very good; only the rice, an insignificant item, was sacrificed. Thus no loss was experienced either publicly or privately in a year of unprecedentedly low water, although the cotton was considerably damaged by most unseasonable weather in September.

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Meantime great events had been in progress elsewhere. (In Egypt all really great events are connected with the Nile.) By 1889 the improved barrage, as well as other minor works undertaken in the Delta and also in Upper Egypt, had put the country in a very much more satisfactory financial condition, and more money was available for reproductive expenditure. The immense gain to the country from a system of perennial irrigation in skilful hands was firmly established. Every year the area of cultivated land in the Delta pushed steadily northwards, while in Upper Egypt the lands about the Ibrahimiyah canal and in the Fayoum, already perennially irrigated, loudly demanded a larger supply, and the proprietors of the basin lands began to hope for conversion to the more profitable if more troublesome double-crop system. But the natural summer supply of water did not expand with these increased demands. In bad years, as we have seen, every drop of water in the Nile was already used up. The need for a reservoir which should store up some of the surplus water of the flood or winter months for use in the summer became more and more urgent. The idea of a reservoir had long floated before the minds of the rulers of Egypt. The success of the Delta barrage first made it a question of practical politics. There were three problems to be faced: (1) Where could such a reservoir be constructed? (2) What arrangements could be made to avoid the danger of huge silt deposits, which would soon seriously diminish its capacity? (3) Supposing that the difficulties of site and design were settled, where was the money to be found? It had gradually come to be recognized that the river-bed itself was the best place for storing the water by means of a dam. In 1890 the government took the matter seriously in hand, and charged Mr. Willcocks with the task of examining the river north of Wadi Halfa, reporting upon the best available site for the dam and preparing a design for it. Mr. Willcocks completed his survey and design in 1894, and after considerable discussion and examination by an international commission, his plans, with some small modifications, were adopted.

As all the world knows, the Assouan site was the one

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selected. There is at this point an extensive outcrop of granite running clear across the valley of the Nile, which it was thought would give sound rock everywhere at a very convenient level for the foundations of the dam. Everywhere else the shifting sands of the river-bed precluded the possibility of laying foundations solid enough to hold up a great head of water. Moreover, the trough of the river above the cataract at Assouan and a long way south of it is exceptionally deep and thus affords an unrivaled opportunity for storage. Mr. Wilcocks's bold design solved the second of the difficulties. Other great dams are solid throughout and are planned so that the rising flood may pass freely over them. But in view of the immense burden of silt carried by the Nile in flood, which the least impediment to its course causes it to deposit, this plan could not be used. The Assouan dam is of a completely new type. Its principle is that the flood water shall pass, not over it, but through it. To this end it is pierced by 180 openings, which are like tunnels in the huge mass of masonry, controlled by powerful sliding gates worked from above. During the flood the whole of the red water passes freely through; every sluice-gate is opened, and the rush of the gigantic mass of water, amounting it must be remembered to at least 10,000 cubic metres of water per second for weeks together, acts like a huge broom, completely sweeping out the floor of the reservoir and securing it against any deposit of silt. Later in the year, about the end of November, when the flood has subsided and very much less matter is carried in suspension, the sluice-gates begin to be gradually closed, and by the end of February or the beginning of March the reservoir is full, without the normal discharge of the river having been affected in any appreciable degree. From April to July the water thus stored up is let out for use further down the river according to the requirements of the season, till by the time the flood is due every sluice-gate is once more up and ready to give passage to the rising stream.

Site and design once settled, the financial difficulty remained. Many tedious negotiations took place, and it was not until 1898 that Lord Cromer succeeded, with the aid of a great financial house, in reaching a satisfactory arrangement. No time was

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lost, and as soon as the flood of 1898 began to subside the contractors were busy with the foundations of the dam. A succession of low Niles gave unusual facilities for the work, and everything was completed before the flood of 1902. From an engineering point of view the construction of the dam was only remarkable for its size; compared with the difficulty of building a barrage on the shifting sands it was a plain and straightforward business enough; but the fact that the rock on which the foundations were laid proved to be rotten in some places to a depth of forty feet added a great deal to the anxieties of the work, though eventually to its strength. The army employed averaged 10,000 men, including 800 skilled Italian stonecutters. The dam itself contains 780,000 cubic yards of masonry (granite and Portland cement), an amount equal to about one-third of the Great Pyramid at Gizeh. It is about one mile and a quarter in length; its height at the deepest point is one hundred and twenty-six feet; its width at the bottom corresponds to its height. When all the gates are closed, sixty-five feet of water are held up. This means that 1,200,000 cubic metres of water are stored up, about the same amount that passes by Assouan in a single day of the flood. The effect on the river is felt as far up as Korosko, one hundred and forty miles to the south.

The Assouan dam is simply a device for storing the water and letting it out for use in Egypt at the proper time. It was necessary, therefore, to supplement it by other works to distribute the extra supply further down the river. Accordingly two new barrages were taken in hand at the same time. The most important of these was the Assiout barrage, just down stream of the head of the Ibrahimiyah canal, destined to perform the same function for middle Egypt and the Fayoum that the old barrage performs for the delta. In principle the Assiout barrage is exactly similar to the other, and the difficulties of construction were precisely the same. In both cases the foundations had to be laid on the shifting sands, and as each section of the work was undertaken a portion of the river had to be diverted from its course by means of temporary earthen dams. There was call for the highest exercise of engineering

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skill; but thanks to the experience gained in dealing with the imperfections of the earlier barrage, the Egyptian engineers were easily able to encounter all difficulties successfully. The platform of solid granite and cement, set at a suitable depth below the bed of the river, is ten feet thick and eighty-seven feet wide. As a further precaution against the undermining action of the water, there are also below the platform two continuous lines of iron sheet-piles with hermetically sealed joints. Besides this, the extra supply available for the Delta necessitated the building of yet another barrage on the Damietta branch of the Nile at Zifta, half way between the point of the Delta and the sea. As the area of the cultivated land spread constantly northwards by means of fresh reclamations, it became apparent that the canal system taking off above the original barrage was too long to admit of the water in times of pressure reaching the northernmost parts. By means of the Zifta barrage the water apportioned to the north has no longer to reach its destination through the network of canals but is passed directly down the river channel, and is thus speedily and effectively distributed into the new series of canals, so that the irrigation of the new lands and still further reclamation go steadily forward. It is unnecessary to describe this barrage in detail. Its principle is the same as that of the others. Indeed, barrage-building seems to have become a mere routine detail of the irrigation department, to be taken as an ordinary part of the day's work.

The dam and the two new barrages cost between them some £3,500,000, a truly insignificant sum when their great results are considered. It will take some years before the full effects are felt; waste lands cannot be reclaimed nor basin lands converted to perennial irrigation in a day. But eventually it is calculated that the extra supply of water will enable 52,000 acres to be reclaimed to cultivation in the Fayoum and 120,000 in the Delta, and 764,000 acres of basin lands converted to perennial irrigation in the whole of upper Egypt. It is a very conservative estimate that conversion to perennial irrigation is worth an extra yield of £2 annually and that reclaimed land produces an annual yield valued at £5. On this basis the

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annual gain to the country will be nearly £2,000,000, while the direct gain to the state exchequer in rentals and taxation will be £378,000. Even the lands already enjoying perennial irrigation reap an immense benefit from the reservoir. In the years immediately preceding its completion, the area under cotton had been greatly extended and the annual crop had reached a total of 6,000,000 kantars, worth at the comparatively low price of 175 piastres (the piastre equals 2½ d.) about £10,000,000. Cotton is a hardy plant and can retain its vitality for a certain period with a very irregular supply of water. The cultivators had taken advantage of this quality to the utmost and had put everything into cotton, leaving no margin. A really bad year would have meant the loss of at least one-tenth of this value; and against such a loss, which might have come once in five years, they are absolutely assured by the Assouan reservoir. The value to the cultivator of absolute certainty and freedom from anxiety on this point is beyond calculation.

It is, however, unnecessary to indulge in prophecy as to the value of the new works, for it has already been proved by actual experience. On August 15, 1902 (the usual date for letting the flood water into the basins), the flood was exceptionally low, and it was feared that a large amount of land would have to remain dry. The Assiout barrage was then just completed. Full of confidence in their work, the engineers decided on a bold stroke and actually closed the gates in the face of the flood. The barrage easily stood the strain; the water level of the canals rose one and a half metres, an increase which was more than enough to avert the threatened disaster. The money value of the crops thus saved was estimated at not less than £600,000, while the whole cost of this barrage, including the works on the Ibrahimiyah canal, was only £875,000. Thus in the first few months of its existence the barrage nearly repaid its cost, and that too by a side wind, for its original purpose was to hold up the river in the low summer season and not in the flood. Again in May, 1903, the discharge of the river at Assouan sank to 200 cubic metres per second. By means of the reservoir this amount was actually doubled all

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through the low season immediately preceding the flood. At the lowest computation the reservoir thus saved the country nearly two million pounds in the first year of its existence. At the great exhibition at St. Louis last year there was to be seen a large-scale model of eight miles of the Nile valley in the neighborhood of Minieh from the desert on the one side to the desert on the other. It is an admirable demonstration of all the forms of irrigation at present in use in Egypt. First there is the Nile itself with its high *berm* or bank; then the perennially irrigated lands about the Ibrahimiyah canal, dating from the time of Ismail; then the lands most lately converted to perennial irrigation on the most approved modern methods by Sir W. Garstin, in anticipation of the increased summer supply from the reservoir; then the Bahr Yusuf canal which feeds the Fayoum; and lastly, bordering on the desert, the remaining basin lands. These last will probably never be converted. They contain the poorest soil and stand in great need of the annual inundation, and they also form a great fortification against the sands of the western desert, which under the influence of the prevailing west winds have a strong tendency to encroach on the cultivated ground.

It would be easy to quote a multitude of figures to prove the marvelous increase of material prosperity which has resulted from scientific irrigation. Whether we look at returns of revenue, of exports and imports, of railway traffic, or the numerous other indications by which the prosperity of a nation is gauged in figures, we find the same story of expansion. The national debt is being steadily diminished, and instead of verging on bankruptcy the country suffers from having to buy back its own stock at a premium in spite of reductions in the rate of interest. Nor is all this appearance of prosperity delusive. The wealth of the country is not monopolized by a few individuals owning huge estates, while the mass of the population are sunk in poverty and slavery. Great as are the sums which have been spent upon the essential irrigation works out of annual revenue, they have not been wrung from the people by oppressive exaction. Irrigation has been the first great principle of British administration, but hand in hand with it

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has gone the principle of low taxation. Year by year there has been some remission, some lightening of the burden. And this is the more remarkable, because until 1899 Egypt had upon her hands a troublesome war, and since then has had to bear the greater part of the cost of the administration of the Soudan.

No better proof of the genuine prosperity of the mass of the people can be given than the fact that Egypt is a land of small proprietors. The number of land-tax payers is returned as 1,026,081. Of this number 96 per cent own twenty feddans (the feddan equals nearly one acre) or less, 85 per cent own five feddans or less, while 80 per cent own as little as two feddans or less. Of the whole soil of Egypt it is calculated that more than one-half is owned by proprietors of 50 feddans and under. Probably few countries in the world can show so large a proportion of small proprietors, and the proportion is steadily rising. In the early eighties, before the British occupation, the tendency was all in the opposite direction, though it is difficult to obtain any exact figures. Not only was the taxation very heavy, but it was also collected at times most inconvenient to the agriculturists, a grievance of hardly less importance. The tax-collector and the usurer worked hand in hand. The demands of the first drove the people into the toils of the other, and yet, owing to the universal corruption of the government officials, supported by the custom and tradition of centuries, the state reaped but little benefit. The indebtedness of the fellaheen to the rapacious Greek or Coptic money-lenders was enormous and grew from year to year; if the process had been allowed to continue, most of the land must soon have passed out of the possession of its original owners. Not the least useful of recent measures has been the institution of the Agricultural Bank of Egypt, which, though a private company, was founded and is carried on with the active concurrence and coöperation of the government. Its sole object is to make loans to the fellaheen on the security of their land or crops at reasonable rates of interest. How successful its operations have been is shown by the figures of the bank's report, published at the end of 1903. It had then 78,911 loans outstand-

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ing, and the average amount of a loan was £27. Nor are its results to be measured solely by the amount of its loans. Its example and competition has had an extraordinary effect in curbing the extortion of those money-lenders who are still in the field. It is not too much to say that all danger of large accumulations of land in the hands of these usurers at the expense of the peasantry has passed away.

But of all the benefits arising from the British occupation, the one which touches most nearly the happiness of the fellaheen has been the practical abolition of the corvée, at least in its most oppressive form. Forced labor is no longer the instrument by which the Egyptian government carries out all its public works. A sound economy has forbidden that alluring but wasteful expedient. Along with it the kurbash or whip, the traditional instrument of the task-master, has vanished; in modern Egypt it finds no place except in the museum. The days when the Suez canal or the Ibrahimiyeh canal was dug by miserable hordes, laboring under the burning sun, unfed, unclothed and unpaid, torn from their homes just when their services were most required there, are past for ever. No longer are the lives of the fellaheen, like those of the Israelites of old, made "bitter with hard bondage, in mortar and in brick and in all manner of service in the field." Since 1889 all earthwork maintenance has been performed by voluntary and paid labor. In part this result is due to the improvement in the barrage, which by raising the water level enabled the canals to be laid at a better slope so as to avoid the accumulation of silt; in part it was due to the direct action of the government. Every year £400,000 is devoted solely to the clearance of silt and the maintenance of the earthworks. The relief to the peasantry of Egypt cannot be reckoned in millions. The government of course retains the right to call out the corvée in case of national emergency, and every year it is called out to guard the dikes in the flood. But the flood corvée is cheerfully and willingly borne. Every one is equally interested in the protection of the banks. It entails no hardship; no man's post is far from the gates of his own village. Its incidence too has been greatly diminished. From 1888 to 1891 about 50,-

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000 men were called out annually; in 1892 the total rose as high as 84,000. But in 1902 the total was only 5,000. As experience accumulates and organization improves, it will probably be found possible to dispense with the corvée altogether, except in the years of very high flood. In 1901, a year of low but not exceptionally low flood, the corvée was not called out at all north of Cairo, for the first time in the history of Egypt. As the basins give way to perennial irrigation, there is naturally a less extent of dikes to be guarded. In any case there is no doubt of the willingness of nearly the whole population to serve when the flood is specially dangerous. At such times the trouble will rather be to prevent the work being hindered by excessive numbers.

From time to time, as the resources of the country allowed, many other reforms have been carried out in every department of the state. The army, the police, prisons, hospitals, railways, not to mention the two great departments of education and justice, have all in their turn and in varying degrees felt the hand of the reformer. Possibly more might have been done had Lord Cromer been willing to import a greater number of Englishmen or Europeans into the service of administration. But this has never been his policy. From the first it has been his view, and he has never wavered in his determination, that it should be one of our prime objects so to educate the Egyptians that, should it ever be necessary or desirable for Great Britain to withdraw from the country, we shall leave behind us a people trained in all the arts of government and thoroughly imbued with the character and spirit without which independent existence as a nation is impossible. With him this profession has been no idle talk. Again and again reforms desirable in themselves have been postponed or abandoned, because they could only be carried out by the substitution of European for Egyptian administrators. Many a time he has had to yield to the pressure of circumstances, but he has always steadily set his face against the undue increase of Englishmen in the service of the Khedive. No Englishmen, for instance, have ever been allowed to hold office as the governors of provinces; and even in the field of irrigation one of the great circles, as the divisions

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of the country for water administration are called, has always been reserved exclusively for Egyptians. No part of his policy has been more freely criticised, often by those whose sympathies were most bound up in the interests of the land of their adoption, often even by Egyptians themselves. But in spite of many disappointments and failures he has held tenaciously to his purpose. Those who read his annual reports know how anxious he has always been to make the natives understand his aims in this direction. No feature of his administration redounds more to his credit than this eager solicitude for the moral as well as the material regeneration of Egypt.

The latter is comparatively easy to measure. Even the most casual visitor can see it with his eyes. But the former is far more difficult to estimate. Two and twenty years may raise a country from the depths of bankruptcy to the pinnacle of secured wealth and credit; it is but a short period in the history of the development of national character. But here too there are signs of progress. Far the most difficult enemy to combat is the universal corruption, that far-reaching canker which has eaten so deep into the heart of Egypt. For centuries it has been the ingrained rule and habit of the people. As in some countries nothing can be done without a drink, so in Egypt nothing could be done without a bribe. The tax-collector was bribed to collect no more than was his due; the result of litigation depended solely on the comparative wealth of the parties; great men or powerful landowners were bribed to refrain from oppressing their inferiors; a high official could be approached only by filling a multitude of outstretched hands; office of any kind was regarded only as a means of growing rich by illegitimate but recognized extortion. To-day it is beginning to be dimly recognized that officials may have other interests to serve than their own pockets; that judges may decide honestly and uprightly, and not invariably in favor of the longer purse; and that tax-collectors are not to be guided in their demands solely by their own personal greed. These new conceptions of duty, right and justice are making headway, but the old traditions die hard. Many an Egyptian official still secretly takes a bribe to perform his plain duty, even when

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both bribed and briber know well that he would be instantly dismissed from his office if he did not perform it; so strong is the habit of centuries. There can be little doubt that if the irrigation system were left entirely in the hands of Egyptians, it would be regarded primarily as an extraordinarily potent engine for extracting "baksheesh" from reluctant pockets: no fee, no water, would soon be the rule, with the inevitable result of disorganization and disaster to the whole country. It would be worse than useless to refuse to recognize these facts, but they furnish no reason to despair of the future. After all, bribery and corruption were not invented in Egypt, nor are they solely confined to that country; the tendencies which they represent are present in all countries in a greater or less degree; they are the universal enemies whom the supporters of good government have everywhere to fight. At least things are better than they were. Among the Egyptian peasantry there has come into common use during the last twenty years a proverb which tells its own tale. It runs thus: "The word of an Englishman is better than honorable." The saying is a testimony to past success, but it is also an admonition for the future. We have been fortunate in the men to whose lot the government of Egypt has fallen. Whatever their success has been, and as an Englishman I do not wish to estimate it too highly, it is due to the fact that the interest of those they govern has always been their first consideration. It would be ridiculous to assert that we maintain our position in Egypt from altruistic motives; it would indeed be the worst form of cant. We have gained much from it already and hope to gain more in the future. But our experience there teaches the lesson, which as a nation with wide imperial responsibilities we shall do well to lay to heart, that the best way to advance our own interests is by an exclusive regard to the interests of those we govern.

Nor would it be fair, while reflecting upon the difficulties with which we have had to deal, to avoid all mention of the advantages which we have had upon our side. The fertile soil and the certain climate of Egypt, together with the inestimable benefit of the great river, were magnificent foundations on

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which to rebuild the prosperity of the country. Least of all can we forget the extraordinary qualities of the fellah. Whatever his faults, and he has his share of them, without his extraordinary industry and power of work, coupled with his heartfelt passion for the soil he tills, the best administration in the world would have fallen far short of the results which we have attained. Lastly we can never forget how much we owe to those French engineers who, in the first half of the last century, by the introduction of the new system of irrigation, the full development of which we have yet to witness, sowed the seed that we and modern Egypt are reaping. It was not their fault that their designs were faultily executed. If they had had behind them the sanction of French bayonets there would have been a very different tale to tell. They had to work through indifferent and incapable or corrupt officials, with no power to enforce their wishes, relying solely on the capricious breezes of despotic favor. The original designer of the Delta barrage was Mougel Bey. When Sir Colin Scott-Moncreiff came to Egypt, he found the poor old man living in obscurity and oblivion, weighed down by poverty and neglect. By his intercession Mougel was rescued from want, granted a pension by the Egyptian government and enabled to spend his remaining years in comfort and honor. In these days, when France and England are once more closely linked by ties of friendship, it is pleasant to recall this graceful and generous recognition of the merits of his predecessor by the chief of the English engineers, at a time when international jealousies were so acute.

SIDNEY PEEL.

LONDON, ENGLAND.

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REVIEWS

History of the United States from the Compromise of 1850. By James Ford Rhodes, LL.D., Litt. D. Vol. V, 1864–1866. New York, The Macmillan Company, 1904.

In the last appeal of the Confederate Congress to the southern people to rally against the invader is the significant, though somewhat ludicrous, sentence: "Failure [to maintain independence] will compel us to drink the cup of humiliation even to the bitter dregs of having the history of our struggle written by New England historians." And surely in the forty years that have elapsed since that appeal the worst fears of the Confederates in regard to biased history-writing have been realized. However, in the volumes of Mr. Rhodes there are few statements of fact or expressions of opinion to which the southerners of that day or of this would object. The fifth volume, which has recently appeared and which covers the period of the most bitter memories, is no exception to the general rule. The first three chapters are devoted to Sherman's campaigns in Georgia and Carolina, ending with the surrender of Johnson, the disastrous Tennessee expedition of Hood, the Hampton Roads conference, the last campaign of Grant, and the surrender of Lee, a discussion of numbers and losses of the combatants, and a statement of the beginnings of Reconstruction under Lincoln. Other chapters relate to the treatment of prisoners of war, life in the North and in the South during the conflict, and finally the process of Reconstruction is traced down to the fall elections of 1866.

In his account of Sherman's march through Georgia and South Carolina, Mr. Rhodes makes it plain that he has no sympathy with the later northern policy of making the war cruel toward non-combatants, but, nevertheless, he lets Sherman off very lightly, and some of the more serious aspects of the destruction wrought by him are not touched upon. A few lines tell of the destruction of Atlanta, and no mention is made of the expulsion of its population. The facts in regard to the wholesale pillage and destruction by Sherman's army are clearly set forth, but seemingly without a realization of the hideous suffering thereby caused among the helpless non-combatant population. Rather is it Sherman's view of "a vast holiday frolic" that is accepted. Too much credit is given to the various commanders for their good intentions as expressed in general orders, which were cheerfully neglected

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by the soldiers, and when blame must be given it is placed upon "bummers" and "stragglers." It will be news to those who lived in the line of march that mistreatment of women and murder were almost unknown. A more exhaustive examination of local southern authorities would have furnished some necessary supplementary facts. And likewise, in regard to the burning of Columbia, no one will care to criticise Mr. Rhodes's impartial attitude toward the question, but here again his habit of preferring to develop his account mainly from northern sources results in a cumulation of facts that do not seem to justify his conclusions. In other words, the author's conclusions are more unbiased than is warranted by the evidence presented. Again it is sometimes difficult to ascertain just how the author wants his reader to accept a certain set of facts and what conclusion is to be drawn. This is often caused by his inserting a quotation where an evaluation of his own is to be expected. But when it comes to such characters as Butler and Kilpatrick, there is no doubt as to the author's estimate.

In discussing the peace movement in 1864–1865 resulting in the Hampton Roads conference, Mr. Rhodes seems to get glimpses of the fact that the southerners were not fighting altogether for the privilege of owning negroes. It is not fair at this late day to intimate, as the author does, that Davis was stubborn and selfish in continuing the war to the end. In this course he was supported by all really responsible persons, most of whom, however, foresaw defeat—and here is a fact for historians to explain though it is very clear to most southern people. Davis is said to have "misconstrued sadly" Lincoln's procedure by considering the emancipation proclamation to be an incitement to slave insurrection. In this Davis only represented the general southern opinion and also a considerable northern opinion, and with all respect to Mr. Rhodes and the Lincoln legend, may it not be said that on January 1, 1863, the welfare of the southern whites was not under consideration at Washington? The opinion expressed that Grant in his final operations outgeneraled Lee is open to criticism. Conditions were too unequal for comparison. Almost any of us could have caught Lee in 1865. If Grant was a better general than Lee he proved it before the final campaign.

The author accepts the estimates of Colonel Livermore as to the numbers enlisted in the Federal and Confederate armies. The exact number of enlistments in the Federal army is known; the number of enlistments in the Confederate army is not known. But by using the census, the War Records, and the enrollment laws Livermore arrives at an estimate of the Confederate forces, as being two-thirds those of the Federals when both are reduced to a three-year basis. But there are

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serious objections to Livermore's method. (1) Even with the Federal enlistments there is no evidence as to the number of different individuals who made up the entire number of enlistments; many individuals enlisted more than once; hundreds of organizations were in service only a few months. (2) Likewise, in the Confederate army the number of enlistments and the number of individuals who bore arms have very slight relation to one another. On account of the multiplication of enlistments, the varying lengths of terms of service and the lack of records, there is not sufficient evidence on which to base a reduction to three years' service. In no two southern states were conditions similar; a rule that will hold for one state fails in another. (3) Livermore's estimates assume the reliability of the southern governors' estimates, the perfection of the conscript service, the possibility of getting out for service the men called for by the census, the enforcement of reserve and militia laws, the uniform size of regiments, and other theoretical possibilities. But it is notorious that the southern governors, like some northern governors, exaggerated the size of the quotas from their respective states, always counting an enlistment as a man (and some enlisted five times); the conscript laws were useful to cause people to volunteer, but otherwise were regarded only in the breaking; the laws regarding recruitment and formation of new regiments were not obeyed, eighteen regiments in Alabama alone being formed in violation of the conscript laws; the regiments in Virginia were larger than in the West, and in neither army was there uniformity; and the reserve and militia existed only on paper. As late as 1865 the Confederate authorities hopefully scanned the census columns after the method of Livermore, but they were unable to get the men the census said should be available. The estimates are based on evidence that will give the theoretically possible numbers; they should be modified by an examination of the material in each state, which will show the practical difficulties in the way of getting out the full military strength. It is quite likely that estimates of the northern forces should be modified in the same way, to get at the number of real soldiers. The proportion of actual fighting men is probably about correct as Livermore gives it. The present reviewer has made a careful investigation of the local records of two southern states and is convinced that the theoretical statistics must be cut down by about one-third. A bit of negative testimony is the fact that the local orators on Confederate Memorial Days in their wildest estimates of the troops furnished by their respective states do not surpass Livermore's figures. Livermore's estimates are prettily worked out; but the reasoning reminds one of

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that ante-bellum mathematical military prophecy based on Bible texts and entitled *Armageddon*.

As to the treatment of prisoners of war Mr. Rhodes's verdict is that there was "no deliberate intention on either side to maltreat prisoners," and that the North has no reason to reproach the South. He accepts the statistics of General Ainsworth in regard to the numbers of prisoners and deaths on each side. The causes and extent of suffering in southern prisons are discussed with good temper and fairness, but it is not quite so clear why prisoners suffered so much in the North. On the whole, from the evidence adduced by Mr. Rhodes, we may conclude that the Confederates, considering their difficulties, exerted greater efforts to care for prisoners. The case of six hundred Confederate prisoners exposed on Morris Island, S. C., to the fire of their own comrades is not mentioned. We should like to know more about the reasons for the execution of Wirz.

In the chapters on life in the North and in the South is given the first well-rounded treatment of social and economic conditions among the people at home during the years of strife. For the South the work has been partially done before; not so much for the North. In the South, the author concludes, the press was freer than in the North; there was less interference by the government with individual liberty, less political persecution and fewer political arrests. In the South, too, popular opinion sustained the government more unanimously, and the officials did not enjoy the use of despotic power as did Seward and Stanton, who were not so well supported by public opinion as the southern leaders. The North was "a dictatorship" and the South "a grand, socialized state," is the comment of Mr. Rhodes, based, perhaps, as to the South, too much upon the evidence of official documents. These latter also lead him to infer that the Confederate administration in the states, especially the conscript service, was efficient, when in reality it was from beginning to end miserably inefficient. Public opinion, however, took to a certain extent the place of a strong central administration. Most men of ability went into the army, and the civil service suffered. Yet, as the author says, the Confederate Congress showed much political capacity and was not as subservient to Davis as is usually believed; the departments were well conducted, and the state governors were of fair ability. In comparing the northern and southern leaders well balanced character sketches illustrate the prominent traits of great opponents: Lincoln and Davis, Stanton, Benjamin, Campbell, Grant and Sherman, and the Reconstruction leaders Stevens, Fessenden and Trumbull.

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The treatment of Reconstruction is confined principally to the Washington side of it. Some points of interest freshly brought out may be mentioned: the bitter sermons from northern pulpits after Lincoln's murder; the feeling of relief felt by radicals when Johnson came to the presidency with violent threats; the idea of the blacks about freedom; and the plans of the radicals for the blacks. Mr. Rhodes inclines to the view that Lincoln could have carried through a moderate reconstruction but that Johnson on account of untactful conduct was mainly responsible for turning matters over to the radicals. There is a good but too short account of conditions in the South; a more detailed account of the "Black Laws" which are so much in controversy would have been useful. The behavior of Johnson in the campaign of 1866 is treated without mercy. Nothing is said of Stanton's manipulation in the affair of the New Orleans riot, and Sheridan's account is accepted Not all will agree that the Fourteenth Amendment was "magnanimous" or that Stephens and Lee should be enfranchised while Davis was proscribed.

In summing up it may be said that the history of Mr. Rhodes, while as fair and judicial as any American can now make it, is distinctly from the northern standpoint; that there is the intent, usually successful, to treat the other side with fairness, though a sympathetic treatment of both sides is naturally impossible at present; that in examining evidence the author confines himself closely to that in favor of the northern contention. Mr. Rhodes is not misled by the partisan nature of the evidence examined; yet it is not always clear that his treatment of material leads one up to the liberal and unbiased conclusions usually arrived at. In other words, his judgments on matters of controversy are as a rule more favorable to the southerners than the presentment of facts seems to warrant. If the southern view of the various controversies were more plainly set forth against the northern view, then the reader would have the satisfaction of following the author to his conclusions. As it is, there are those who will think the author too moderate in some respects. As a whole, the book is far superior in liberality to anything that has yet been written and the average southern sympathizer will probably be better pleased with it than the average northern man. It is to be hoped that the fine spirit and admirable temper shown in this work will have definite results in correcting the bias of the average school histories, the most potent agencies for perpetuating sectional misunderstandings.

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The American Nation: A History. Edited by ALBERT BUSHNELL HART. Group I. *Foundations of the Nation.* Volume 1. *European Background of American History.* By EDWARD POTTS CHEYNEY. Volume 2. *Basis of American History.* By LIVINGSTON FARRAND. Volume 4.[1] *England in America.* By LYON GARDINER TYLER. Volume 5. *Colonial Self-Government.* By CHARLES MCLEAN ANDREWS. New York, Harper & Brothers, 1904.—xxviii, 343; xviii, 303; xx, 355; xviii, 369 pp.

In the number of serial histories put upon the market during the last two years all previous records have been broken. There are histories of the United States, histories of North America, and histories of the world. The publishers have made special appeals to the man with the fat pocket-book, who appreciates handsome bindings and illustrations, but is not over particular in regard to the style or authenticity of the text. An exception, however, must be made in favor of *The American Nation.* It is neatly bound, it is printed on good paper, and it has a few well-chosen illustrations. But these are secondary considerations. The important fact is that it is not a mere reprint of authorities of the pre-copyright age. It is an entirely new work, and the men selected to do it are well known specialists, scholars with reputations to sustain. At the same time one or two of the volumes in this first group betray that haste and carelessness which we so frequently find in writers who feel that they are doing hack-work.

In the initial volume of the series Professor Cheyney explains the importance of the change from mediæval to modern conditions both in trade and religion, and thus emphasizes the two chief motives of colonization. He devotes one chapter to the political institutions of France, Spain and Holland and four to those of England—a just proportion, Mr. Douglas Campbell to the contrary notwithstanding. There is nothing in the book distinctly new or revolutionary, but it can be commended as a good short account of the subjects which it treats. The statement that there were in England at the beginning of the seventeenth century "four well-marked religious parties . . . Churchmen, Catholics, Puritans and Independents" (p. 200), is hardly in accord with the best usage. Since most of the Puritans were still Churchmen and since the Independents were merely advanced Puritans, it is difficult to see how they could constitute well-marked religious parties. The reasons advanced to explain the well-known fact that few English Roman Catholics came to America are interesting and suggestive. The

[1] Volume 3, Spain in America, by Edward Gaylord Bourne, was reviewed in the POLITICAL SCIENCE QUARTERLY for June, 1905, pp. 329–332.

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severe laws directed against them were largely unenforced; they were always hoping for an amelioration of their condition at home; there was no colony in America which would afford them a secure refuge; and, finally, the great proportion were of the nobility and gentry, classes which did not emigrate (pp. 213–215). One wonders whether Professor Cheyney really means to say (p. 210) that Catholics alone could hold office under the Maryland charter of 1632. Ranke's work is not included in the bibliography of English history during the seventeenth century.

The chief criticism that might be made on Professor Farrand's volume is that his treatment of the subject is too narrow, too technical in character. He over-emphasizes the purely physiographical and ethnological sides, those which make the strongest appeal to him as an anthropologist. Mountains, plains, waterways, trees, minerals, Indian customs are all interesting in themselves, but in a series of this kind some attention at least ought to be paid to their historical influence. This defect may partially be remedied in subsequent volumes; still we cannot but feel that the author neglected the opportunity of giving the information where it would be most effective. Professor Farrand's conclusions in regard to pre-historic man in America are conservative The mound-builders were the ancestors of the present Indians, and no one knows whence they came. The Eskimo are probably American rather than Asiatic in origin. Many of our long-cherished traditions in regard to the manners and customs of the Indians have recently been successfully attacked. For example, we can no longer assume that the Indians believed in one Great Spirit, or that the Aztec civilization was radically different from that of other Indians, or that Montezuma was anything more than a war chief who held under an elective tenure.

The English colonial period until the Revolution of 1689 is covered by President Tyler and Professor Andrews, the recognition of parliamentary supremacy by the southern colonies in 1652 marking the line of division. The work of the former is the poorest of the group, that of the latter, with the possible exception of Bourne's, is the best. The weakness of President Tyler's volume lies not in errors of detail, but rather in the fact that the author has been unable to grasp fundamental principles. The idea implied in the title, *England in America*, that "during the first half-century the American colonies were simply outlying portions of the English nation" (p. xiii) is not adequately developed. The chapters devoted to the New England colonies are especially disappointing. A failure to appreciate the influences of Puritanism upon our history is even more unfortunate than the old

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tendency to exaggerate. As might be expected, the treatment of Virginia and Maryland is more satisfactory. The author shows, among other things, that the aristocratic government of the South was at bottom essentially democratic, and accounts for it in part by the fact that negro slavery made race and not wealth the essential distinction (p. 116). This is in line with Burke's theory that those who hold slaves are especially jealous of their own freedom. It was the most natural thing in the world for the Virginians in 1792 to accept Jefferson's principles, without thinking for one moment of extending them to their servants. The author's restraint in dealing with John Smith is evident, although he does not hesitate to accept the Pocahontas story.

Of the four volumes under review that by Professor Andrews contains the greatest amount of new material. A careful use of printed sources as well as of manuscripts unearthed in the British Museum, the Bodleian and the Public Record Office throws light upon several questions which have hitherto been far from clear, such as the enforcement of the acts of trade, the history of the Connecticut and Rhode Island charters, and the intricate history of the Jerseys. Among the Rawlinson papers in the Bodleian were found three letters written from Charleston, South Carolina, by Thomas Newe in 1682, which give us a good picture of the Ashley river settlement during its infancy. Professor Andrews has been fairly successful in avoiding the mistake of making the leading men of the time mere pawns moved along by social and economic forces. The interesting manner in which Bacon's Rebellion is discussed will excuse what might at first appear an undue apportionment of space—an entire chapter (seventeen pages) is devoted to it, while King Philip's War is dismissed with three pages. Andros and Randolph are no longer the ogres described by Bancroft and Palfrey, but conscientious officials who were unpopular because they were loyal to duty. The statement that each community had by 1650 put into practice the principles of manhood suffrage (p. xvii) seems open to question. In the New England colonies, in general elections at least, the suffrage was restricted to members of the corporation, and in two of them, Massachusetts and New Haven, church membership was also a qualification.

Each volume "contains a portrait of some man especially eminent within the field of that volume," a series of maps, a bibliographical chapter and an index. Professor Hart's editorial work deserves to be praised. The tiresome duplication of treatment so often found in productions of this kind has happily been avoided.

W. ROY SMITH.

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The Suffrage Franchise in the Thirteen English Colonies in America. Publications of the University of Pennsylvania, History Series, No. 2. By ALBERT EDWARD MCKINLEY. Philadelphia, 1905. —vii, 518 pp.

Dr. McKinley has produced a thorough and valuable study of the suffrage in the English-American colonies. It differs from Bishop's monograph—published twelve years ago—in the scope of the subject treated, in the classification of the material, and in the purpose which has controlled the work. Bishop sought to describe not only conditions which affected the suffrage, local and colonial, but the mechanism of elections as well. McKinley concerns himself almost wholly with the former subject. Bishop classified his material with a view to the light it might throw on elections as such—on the method of conducting them and the classes who took part in them. In other words, elections considered as a political phenomenon of world-wide significance, was what he sought to illustrate, and those which occurred in the American colonies were selected for the purpose. His work was therefore primarily a contribution to political science, and only secondarily a contribution to American history.

McKinley, on the other hand, has based the classification of his material on the colonies themselves. He has not studied the subject of elections wholly for its own sake, but for the light which it may throw on political conditions and organization in the American colonies. His controlling purpose has been to use the subject of elections as a means of throwing light on the origin of the American nation and on its political kinship with England. His work is therefore primarily a contribution to American history and only secondarily a study in political science. This, as it seems to the reviewer, indicates in broad lines the difference between these two useful monographs.

Dr. McKinley begins with a chapter on parliamentary suffrage in England. In the light of English experience he then reviews the law and practice relating to the subject in each of the American colonies. He has not used any special classification of the colonies, though that might have facilitated his work and have better enabled him to distinguish results which proceeded wholly from frontier or colonial conditions from those which were to an extent imposed by colonial executives or came in through instructions from the home government. Attention, however, has been paid to "the influence of cheap land, of religious zeal, and of frontier ideals of equality" upon the aristocratic system which was inherited from England. As the author begins with England, so with her he concludes. He finds that her customs exer-

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cised a controlling influence on the qualifications of voters in the colonies. Unconsciously or consciously, this result was brought about by the efforts of British authorities. In the beginning, especially in New England, a franchise similar to that of the English towns was developed. Later, partly under outside pressure and partly as the result of the operation of an aristocratic instinct among the colonists themselves, property qualifications were prescribed in the colonies. This caused a more complete approximation to the English county franchise.

Of special value is Dr. McKinley's monograph in its treatment of the various property qualifications in the colonies, his analysis of freemanship in the New England colonies, his references to proxy voting and the use of the ballot, his account of the definitions which were given of residence and what constituted an inhabitant for the purpose of the suffrage. The property qualifications he distinguishes as those which did not state the form of property required, those which limited the necessary property to freehold alone, those which prescribed an alternative between a minimum in the form of personal property and one in the form of real property, and those which established a tax-paying requisite for voters. He calls attention to the peculiar fact that in New England and New York the freehold was expressed in terms of value or income, while in the colonies south of New York it was stated in terms of acres or lots. The number and importance of boroughs in the southern and middle provinces and the characteristics of their suffrage are emphasized more than in any other work.

Dr. McKinley's conclusions as to the size of the voting class are interesting and are borne out by all the evidence which he and others have collected. They are that in Puritan New England the suffrage was more restricted than in the other colonies, and that, in them all, both the actual and the potential voting class formed only a small fraction of the total population. "The potential voters seem to vary," he says, "from one-sixth to one-fiftieth of the population."

> At best the colonial elections called forth both relatively and absolutely only a small fraction of the present percentage of voters. Property qualifications, poor means of communication, large election districts, and the absence of party organization, combined to make the most sharply contested elections feeble in their effects upon the community as compared with the widespread suffrage of the twentieth century.

A thoroughly prepared index adds greatly to the ease with which the book may be used.

HERBERT L. OSGOOD.

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Party Organization and Machinery. By JESSE MACY. New York, The Century Company, 1904.—xvii, 299 pp.

Early Political Machinery in the United States. By GEORGE D. LUETSCHER. George School, Bucks County, Pa., 1903.—160 pp.

Professor Macy's volume is the third of the *American State Series*, in which Willoughby's *American Constitutional System* and Goodnow's *City Government in the United States* have already appeared. It is also the third systematic treatise on the subject of American political parties within the last few years. First came Ostrogorski's *Democracy and the Organization of Political Parties* (2 vols., 1902), then Woodburn's *Political Parties and Party Problems in the United States* (1904), and now Professor Macy's exposition. The characteristic feature of this volume, however, is its critical and comparative examination of party machinery as such. In addition to an inquiry into the national organization, four states, Pennsylvania, Massachusetts, Indiana and Missouri, are selected for detailed examination of the anatomy of state and local committees and the interrelation of the various party organs. The author by no means limits himself, however, to an inspection of the intricacies of party machinery, but enters incidentally into an investigation of the actual operation of the system and the forces that produce and sustain action.

This study is not and was not intended to be an exhaustive treatise covering the entire field of party activity. It is an examination of special phases of party practice; and consequently such subjects as primary regulation, the boss, his methods and significance, the legal status of parties, plans for party reform and their workings, are of necessity either briefly discussed or entirely omitted. Even in the field of party organization the inquiry is not comprehensive, but is intended merely to display certain typical forms. Professor Macy himself recognizes the difficulties when he says:

> Study of the party system and the party organization more thoroughgoing and comprehensive than has yet been undertaken, and by a large number of careful students and observers, must precede any adequate solution of the questions here suggested [p. 125].

Some errors, although none of importance, have been noted. The meetings of the congressional caucus were not secret, as indicated on page 61; neither the national committee nor the temporary chairman chooses the committee on permanent organization (p. 75), but this is done by the delegations from the various states; delegates to a state

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convention are not necessarily chosen by counties, but may be elected directly by primary districts (p. 62); in the Pennsylvania Democratic state central committee the ratio of representation is one per 10,000 and not one per 1,000 as stated on page 129.

On the whole, Professor Macy's volume is a decided contribution to our knowledge of the American system. The volume is not comprehensive and conclusive, but it is suggestive and helpful. It is of especial value because of the importance attached to an examination of those details of party organization which are as a rule hidden from the wise and prudent and known only to the practical politician. Itself incomplete, the volume points the way to, and shows the need of, a scientific collection and classification of the facts regarding political parties.

Dr. Luetscher's volume is a scholarly study presented as a doctor's dissertation in the University of Pennsylvania. It covers the early restrictions imposed upon suffrage, the development of the Democratic societies and the genesis of nominating machinery in county and state.

Among the interesting features of the monograph is the attempt to ascertain the extent to which the right to vote was exercised in the early days of the republic. On the basis of returns from the states north of the Potomac, Dr. Luetscher estimates that 5.2 per cent of the population actually voted in 1788–91; as to the possible vote he gives no percentages. He further points out that by 1800 the percentage of voters had risen to 8.3—a fact which he attributes to the development of party organization in the meantime. To party organization he attributes in part the rout of the Federalists by the Republicans who were better supplied with party machinery. In Delaware, where the Federalists had an organization, Dr. Luetscher shows that as late as 1823 they were still fighting on, even without a platform. An important part of the work is found in those pages where it is shown that the legislative caucus was never introduced into Delaware and New Jersey, but that the nominating convention was the first and continued to be the only systematic mode of presenting candidates.

These two studies of party machinery, one historical in character and the other based on contemporary material, illustrate the possibilities of this kind of investigation. It is highly desirable that the historical work should be brought down to the present time and that the partial examination of present-day organization should be made complete and comprehensive.

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The Civil Service and the Patronage. By CARL RUSSELL FISH. New York, Longmans, Green and Co., 1905.—xi, 280 pp.

A monograph on this subject was well worth doing, and Professor Fish's work is exceedingly well done. Civil service reform has become so largely an accomplished fact that the historian may now print the truth about the spoils system without exposing himself to accusations of immorality. It was not so many years ago that some of the author's judgments would have evoked outbursts of denunciation from individual reformers, if not an official wail from the national association. Professor Fish suggests, for example, that the spoils system "is not absolutely synonymous with bad service" (p. 151), and that through it "for the first time in history a numerous and widely-scattered people has enabled itself to direct its whole force to its own advancement" (p. 157). In the innermost sanctuary of reform such doctrines are manifest heresy, but in the open court of history they have a striking resemblance to truth.

What Professor Fish has given us in his book is a clear, straightforward, pleasantly-written account of the opinions and practice as to appointments to and removals from office in the national administrative service from the adoption of the constitution to the present time. Rightly regarding Miss Salmon's well-known monograph as covering sufficiently the constitutional aspects of the matter, he has confined himself to the motives of the men who were most concerned in the spoils system and the causes and results of the policies which they represented. The subject is very large and at many points very obscure, since the most capable exponents of "spoils politics" were never especially concerned to leave a record of their activities. The author has been obliged to make extensive researches in the newspapers and in the memoirs and extant papers of influential men, and his work in this field has been particularly well done. It was of course inevitable that where this sort of material had to be depended upon the best results should appear in the remoter periods, for which more of the private personal records are available.

On some long-mooted historical problems Professor Fish is suggestive. As to whether Jefferson or Jackson introduced the spoils system, his conclusion seems to be that Jefferson really employed it, but that Jackson was the first to be caught in the act. In reference to the charge against William H. Crawford, that he procured the passage of the four-year term act of 1820 for the advancement of his personal political fortunes, Professor Fish, influenced apparently by the useful

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researches of Dr. U. B. Phillips in Georgia politics, reverses the long-accepted verdict of guilty and pronounces the charge at least not proven and probably false. Martin Van Buren's late rehabilitation by Mr. Shepard is taken with some allowance by Professor Fish, who finds no reason to reject the old opinion that the little magician of Kinderhook did his most characteristic work in the realm of politics rather than in that of statesmanship.

The climax of spoils politics is placed by Professor Fish in the two decades from 1845 to 1865. With the end of the Civil war the movement for reform began in earnest, and has progressed to substantial triumph.

The historical spirit manifested by the author is of the most judicial and enlightened type. His philosophical analysis of the principles involved in the matter of spoils and patronage is in general admirable. It would perhaps have been proper to have gone a little further back in time than the Dutch Republic in tracing the pedigree of the idea of rotation in office. Aristotle, whom the publicists of twenty centuries closely followed, made alternation in commanding and obeying a leading principle in his conception of the best popular state; and Harrington's *Oceana*, much read by John Adams and Daniel Webster, dwelt at great length on the idea of an "equal rotation" as essential to a true commonwealth. It may be likely that the introduction of rotation in the United States was as much due to this philosophical tradition as to the "old Dutch custom" to which the author refers (p. 80). But he is of course thoroughly committed to the doctrine that rotation and spoils are normal accompaniments of democracy in certain of its stages, wherever democracy becomes established.

Professor Fish's printer has disguised Mr. McAneny as "Mr. McAnery" (p. 227). It is to be regretted that the responsibility for "transmogrified" (p. 81) and "fearsomely" (p. 106) cannot also be placed on the printer.

WM. A. DUNNING.

Elements of International Law. By HENRY WHEATON, LL. D. Fourth English edition by J. BERESFORD ATLAY, Lincoln's Inn, Barrister at Law. London, Stevens & Sons, 1904.—xxxv, 848 pp.

It seems at first sight rather remarkable that no edition of this classic among American legal text books should have appeared in the United States since the publication of Dana's edition in 1866, whereas in England it has meanwhile passed into its fourth edition. This is

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probably to be attributed to the indifference to the whole subject of foreign relations which may be said to have prevailed in the United States from the Geneva Arbitration to the Spanish-American war. In England, and in Europe generally, the interest in international law has been unabated. Moreover, the fact that Wheaton's *Elements* has for many years been the text book prescribed for candidates taking examinations for the British foreign service has caused an additional demand for the work in England, aside from the needs of publicists and lawyers. The author and the book have therefore had a somewhat similar fate in being more honored abroad than at home. In this country, on the other hand, Hall's *Treatise* is the work on international law now most generally used and referred to as authority.

In a former number of the QUARTERLY,[1] the present reviewer examined the last edition of Hall's work, which was also prepared by Mr. Atlay. The reviewer was not then aware that Mr. Atlay was engaged in editing a new edition of Wheaton, and he took occasion to indicate the omission or inadequate treatment of certain events in the recent history of American foreign relations which ought properly to be included in a discussion of the development of international law in the last decade. It is evident that Mr. Atlay has divided his topics and has assigned to the new edition of Wheaton those which are of a more strictly American character.

The present edition of Wheaton is really the fourth edition of that work by A. C. Boyd. Boyd's edition is familiar to students of the subject, inasmuch as it was the only form in which the book was readily obtainable since the editions of Lawrence and Dana went out of print. The labors of Mr. Atlay, therefore, consist in a re-editing of Mr. Boyd's notes, by making certain omissions and verbal corrections and by adding historical summaries which bring the several topics down to the date of the present edition. A comparison of the last edition by Boyd with the present one would indicate that Mr. Atlay's work amounts in all to about twenty pages.

The new matter supplied by the present edition is chiefly the following: A note on the position of China and Japan with respect to international law (pp. 22, 23); some remarks on the Monroe doctrine (p. 98); the Greek war of 1897 (p. 118); the Alaskan boundary question (p. 268); the Panama canal and the Hay-Pauncefote treaty (p. 319); the Hague peace conference (p. 405); the substitution of the text of the Hague convention with respect to the laws and customs of war on land for the text of the declaration of the Brussels confer-

[1] September, 1904, vol. xix, p. 494.

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ence of 1874 (pp. 556 *et seq.*); the case of the "Bundesrath," involving the question of contraband as affected by ultimate destination (p. 670); and submarine cables and wireless telegraphy in war (p. 721). Having been published at the outbreak of the war in the Far East, there is of necessity only a bare reference to a few incidents marking its beginning.

Among the subjects omitted we note the following: There is no reference to the case of Cuba, either in connection with the recognition of independence or with intervention. The legal basis for intervention in Cuba was clearly indicated by Sir Frederick Pollock, in a letter to the London *Times* in April, 1898, and was correctly referred to the principle of the abatement of a nuisance.

There is no reference under semi-sovereign states to the Transvaal, nor to the much debated question of British suzerainty over it. Indeed there is practically no notice taken of the questions raised by the Boer war respecting the laws of the war. The practice of the United States and Spain as to enemy vessels in port on the outbreak of the war of 1898, and of the United States with respect to Spanish vessels sailing for United States ports prior to the same date, and the allowance to Spanish vessels in blockaded ports of thirty days for departure, are not mentioned; nor is there reference to the adoption by the parties, as a *modus vivendi* during the war, of the "additional articles of 1868" of the Geneva convention.

The statement of the Alaskan boundary question would have been clearer if it had contained a quotation in full of clause two of article iv of the treaty of 1825 defining the boundary. Aside from the point as to the true "Portland channel," the crux of the whole question was the interpretation to be given to this clause. To most Americans who had given the subject attention, it seemed scarcely necessary, in order to refute the claims of the Canadians, to do more than quote the language of the treaty.

In connection with the work of the Hague tribunal (p. 407) the bare reference to the "Pious Fund" case and that of the preferential claims against Venezuela, seems totally inadequate. There is no statement of the facts or any attempt to examine the questions of law involved. Reference should have been made here to the submission to the Hague court in August, 1902, of the dispute between Japan on the one side and Great Britain, France and Germany on the other, as to the right, under treaties with these powers, to tax buildings erected on perpetual leasehold property in Japan. A decision against Japan has been reached since the publication of the book. Although the editor makes

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reference in his preface to the "increased resort to arbitration" since the publication of the last edition, he has nothing to say of the Bering sea case. From a juristic point of view this arbitration was of greater importance than that of the Alaskan boundary. The latter involved chiefly the construction of a treaty provision, while the former decided questions of substantive law.

About forty recent decisions of the law courts are cited or referred to, the great majority of which are English, and of these last about half relate to the conflict of laws. About a dozen late decisions of the supreme court of the United States are cited, which include some of the cases growing out of the Spanish-American war. One case of some importance, that of the "Paquete Habana,"[1] is cited merely to show "the value attached to text writers in the American courts." There is no statement of the question of law decided; *viz.* the exemption of coast fishing vessels from capture in time of war. As a leading case in American law, and one marking a step in the development of international law as administered by the courts, it ought not to have been slighted. In one instance, however (section 519 *a*), the decision in the case of the "Adula"[2] has caused a modification in the language of the paragraph, so far as relates to sailing to a port known to be blockaded.

It is due to Mr. Atlay to say that his work, though almost exclusively of an historical character, is carefully prepared and that no important misstatements have been observed. It is to be regretted, however, that an apparent desire to avoid the mistake of other editors in overloading a text with notes has led him to compress his annotations unnecessarily, and at the same time to abstain from the discussion of legal principles.

New matter in the appendices is the British neutrality proclamation and rules of February 10–11, 1904, and the Anglo-French agreement of April 8, 1904.

The general arrangement of the book in sections is the same as that originally made by Dana and adopted by Boyd. The table of contents by sections is restored and numbered, which is an improvement over the briefer table of the earlier edition. The type is large and is therefore, so far as Wheaton's text is concerned, preferable to the American editions. Moreover, the notes are placed in smaller type in the body of the page, so that whether they are read or omitted, there is not the same hiatus in the argument that usually follows the reading of a footnote.

JAMES F. BARNETT.

GRAND RAPIDS, MICHIGAN.

[1] 175 U. S. 677.

[2] 175 U. S. 361.

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The Distribution of Wealth. By THOMAS NIXON CARVER. New York, The Macmillan Company. 1904.

This work is a presentation of the laws which determine the relative size of generic classes of incomes. A preliminary chapter on "Value" is given as a necessary introduction; and the second chapter entitled "Diminishing Returns" may fairly be regarded as laying a part of the foundation for much of the subsequent analysis. The general outcome of the inquiry is not very dissimilar to that reached by Marshall, the law of marginal utility being invoked to explain the magnitude of the shares going to the various productive factors. Characteristic of Professor Carver's version of the matter is a certain vigorous impatience of some of the nicer and subtler distinctions which other economists have been disposed to insist upon. He thus attains a directness and compactness in exposition at the sacrifice occasionally of breadth in canvassing certain elements which his theme involves. For instance, there is no analysis of cost, nor any differentiation between various phases of cost, although cost constantly figures in his explanation. There is, as it seems to me, very inadequate realization of the distinction between the technical and the economic aspects of production, the assumption commonly being that the two coincide quantitatively. Even in the case of the term "value," though one may grant that it ordinarily implies power in exchange, one may protest against the attempt to exorcise all other content from the term. To say that "value is always and only (*sic*) the power to command other desirable things in peaceful and voluntary exchange" (p. 3) neglects the fact that the economist has no monopoly on a term which is in current use in art, in technology, and in ethics. Even in economics the minimum cash reserve of a banker has value to the banker as a guarantee of solvency, not as a means of exchange. To say that the banker's cash reserve has for the banker no value but only utility appears both stilted and a trifle pedantic. If one were disposed to quarrel further with Professor Carver's terminology, one might object to defining supply "as the amount on hand" (p. 25) and demand "as the desire for the commodity, coupled with the ability to purchase it" (p. 25). It seems to me more proper to define both terms in the same kind of units. Moreover it seems logically inconsistent to say "that a commodity has value only when there is a demand for it, and when the supply is insufficient to satisfy that demand" (p. 26); and further on to speak of values determined by "the equilibrium of supply and demand" (p. 37). It is true that these are mostly verbal infelicities which do not vitally impair the argument, but this is the price which

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the author has had to pay for the untempered vigor of his exposition which verges here and there on the crude.

The best chapters in the book, in the reviewer's opinion, are those on "Interest" and "Wages." The first one touches high-water mark as an acute criticism of Böhm-Bawerk. That it is marginal abstinence and not total abstinence which determines the supply of material productive agents commonly called capital seems an unassailable position. The chapter on "Wages" is good in its insistence that "there are almost as many kinds of labor as of products, and it would be quite as unreasonable to try to find a general rate of wages for labor as to find a general price for products" (p. 134). The exposition of Malthusianism is also clear and cogent.

The chapter on "Diminishing Returns" is evidently the one on which the greatest pains have been spent, and yet the result does not seem quite commensurate with the unflagging toil which it represents. It distinguishes very properly between the law of diminishing returns and the law of the comparative economy of large and small scale production. Many of the corollaries of the first mentioned law are set forth in a somewhat novel light. The law is universalized so as to read: "There is one law which governs the results of every variation of the proportion in which the productive factors are combined, no matter which factor is varied" (p. 76). But after all, this cannot be said to be strictly new matter brought to light. When after some considerable manipulation of formulae the conclusion is reached on page 73 that "where land is dear and labor cheap, the tendency is toward intensive cultivation, *etc.*," one feels a trifle like the young lady who after having threaded the mazes of Mr. Balfour's philosophic defence of religion, remarked that it was "*a long way around to the family pew.*" To one who is approaching the comprehensive study of diminishing returns Professor Carver's chapter may be recommended; but the character of most of its contents seems to be very like the material which Marshall relegates to his Mathematical Appendix—food for reflection but not uniformly matter of the first magnitude in importance.

Professor Carver believes in the validity of the distinction between land and what has commonly been called capital, and insists therefore upon distinguishing rent from interest. He is under the necessity therefore of repelling the recent assaults upon the traditional segregation of land from other material productive agents. A book review of this tenor can hardly canvass the arguments *pro* and *con* in this dispute. From the logical standpoint the two sides are nicely balanced. One thing, however, that I should not like to dismiss without protest is what

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seems to be Professor Carver's misapprehension of the position of those who hold that land surface is turned into economic land (sometimes called land capital), by the same processes and agencies as transmute raw materials into material productive agents. Professor Carver says of the argument that land surface is turned by labor into land capital (p. 113): "Now land capital can not possibly mean anything else than land *value*. . . . But to argue that though land surface may not be increased, land value may, is to beg the whole question." This transformation of the argument into an issue of enhanced value seems to miss the point altogether. Waiving the question of value wholly, the contention of those who assimilate land and other produced means of production is, as the reviewer understands it, that new economic land is being constantly produced in the same way that new gold is being produced. Just as gold hitherto inaccessible and useless is made accessible and useful, so land hitherto inaccessible and useless is being constantly added to the land which effectually contributes to human well-being. The Panama canal, the work of irrigation, and the extension of railroads are thus in reality "producing" land in as real a sense as the Baldwin locomotive works are producing locomotives.

I have already expressed my hearty approval of Professor Carver's acute criticism of Böhm-Bawerk. I think, however, that the spirit of that criticism is forgotten if not transgressed in the attempt to buttress the *pons asinorum* of the classical school, to wit, that rent does not enter into price. Professor Carver puts the matter thus:

> the three following propositions may be laid down respecting labor: 1. In order that there may be production, there must be labor. 2. In order that there may be labor, there must be wages to persuade men to work, and to enable them to do so, otherwise there will be no labor and no production. 3. Therefore wages are necessary in order to secure the production of goods. . . . Obviously no such propositions as the second and third can be made respecting rent [p. 208].

In an analogous case, however, Professor Carver points out that Böhm-Bawerk is in error in that he fails to distinguish between total saving and marginal saving. Says our author:

> Consequently, interest does not correspond to any general discounting of future consumption of commodities, but only to the marginal discount or to the marginal sacrifice of saving. It must be sufficient to compensate the capitalist for saving the last increment of capital [pp. 239, 240].

If Professor Carver is to be logically consistent, it seems to the reviewer

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that he ought to say: "Consequently wages do not correspond to any general sacrifice involved in labor, but only to the marginal sacrifice or marginal cost of the labor." But if this last admission is required by logical consistency, the three propositions *supra* lose much, if indeed they do not lose all, of their force. The marginal wage which is just sufficient to evoke the last increment of the labor supply, is paralleled by the marginal rental or the sum required to induce the landlord to add the last increment of land contributed to production. The conclusion would seem to be that both rent and wages enter into price, or that neither does.

The chapter on "Profits" is unique in one way, in that the business man's assumed capacity to out-bargain the laborer and capitalist is made a "frequent," and by implication a common source of profits. There is a reminiscence of Hobson here, but whether the assumption is valid as a normal source of profits, is, in my judgment, open to question.

The social conclusions of the theory are what are logically implied in the distinction maintained between rent and interest. Landowners are commonly

> mere parasites, receiving a share of the product of the industry of others and lending no aid in return, unless permitting their land to be used can be considered as lending aid. But . . . . they can hardly be regarded as contributing anything to society when they in turn permit their land to be used [p. 203].

The defence of interest (p. 257) as a social institution on the other hand is a better matured and more satisfactory piece of work. The two contrasted verdicts on practical matters evidence the comparative validity of the theoretical analyses on which they respectively rest.

W. M. DANIELS.

PRINCETON UNIVERSITY.

The Bank and the Treasury. By FREDERICK A. CLEVELAND, Ph. D. New York, Longmans, Green & Co., 1905.—326 pp.

To the lover of precision of thought and expression in scientific discourse, the opening sentence of Mr. Cleveland's book is a disagreeable surprise, *viz.*: "December, 1890, Baring Brothers announced to the world that the credit institutions of Europe had called a halt." Nobody ever saw such an announcement from Baring Brothers. On the contrary they strove to prevent the making of it. The last thing they wanted was the calling of a halt. A little further on the author

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tells us that in December, 1890, Baring Brothers failed, and in another place he says that they would have failed had not the Bank of England and other helpers intervened and prevented that catastrophe. The last of these three statements is correct. The one quoted above is a glaring specimen of "reportorial English," by which the author means to say that in December, 1890, a check was given to the career of speculation then prevailing in Europe.

Another outbreak of reporter's English is found on page 32, where the author gives a sketch of what he conceives to be "the Development of American Banking Ideals:"

> The war of 1812 was directed against the New England coast towns. It was a war of the interior against the East. As against England it was a failure; as against the East the interior won a decisive victory. The enormous foreign trade interests of the North Atlantic seaboard were ruined.

The war of 1812 was directed on our side by the administration of James Madison. To say that Mr. Madison directed it against New England is a slander, if taken seriously. If it is not to be taken seriously it is a joke which will not add to the author's reputation as a humorist. Lightness of touch may be permitted and even encouraged in a writer who has a good grasp of his subject, but what are we to think of one who defines bank deposits in two different ways on the same page? His first definition (page 4) is "demand obligations of the banks used in the community as funds;" the second is "bank credit accounts." The latter would serve well enough if standing alone, but the two together lead to confusion. Doubtless the writer means the same thing by both phrases. If so, there is the less excuse for his diversity, which will puzzle uninstructed persons and send them groping for the meaning which he attaches to the word "funds." This word and the words "current funds" and "funding" are frequent stumbling-blocks throughout the book. "Current funds" are commonly understood to mean currency, but on page 28 the author applies the phrase both to bank credit accounts and to legal tender money.

Chapter ii, entitled "The Use of Commercial Credit in Lieu of Industrial Capitalization" is as obscure as that locution might imply. What the author means is the transaction of business by traders and producers with insufficient capital. By way of clearing the ground he says:

> In business [what business?] there are two distinct classes of obligations

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for the future payment of money, which are made subjects of investment [investment by whom ?]. These two classes are commonly known as (1) capital liabilities, and (2) current credit liabilities, or floating debt. The capital liabilities are those obligations (shares or bonds) incurred by a concern which are sold to obtain funds or properties for permanent equipment or for continuous use in the business. The current credit liabilities are those obligations which are sold to obtain funds for some temporary or current need. These differing purposes give character to the two classes of contracts as investments.

How helpful this explanation must be to a reader who has been perplexed by the Delphic headline !

Chapter iii is entitled " The American System of Currency and Banking," which is changed, however, as a page heading, to " The American Current Funding System," whatever that may be. Explaining the reasons for the organization of the first Bank of the United States, the writer says :

The circumstances of the time required (1) an agency of such financial vigor and strength as would serve the government in refunding its debt; (2) an institution of national scope such as would give the people a sound currency ; (3) a bank with powers of discount equal to the volume of commercial credit used.

The Bank had no functions to perform in refunding the public debt, and was not intended to have any. The funding act was passed in 1790, the Bank act in 1791. They had no connection with each other ; on the contrary, the Bank was forbidden by its charter to purchase any public debt whatsoever. So much for number 1. As regards number 3, it is difficult to understand what is meant by " powers of discount equal to the volume of commercial credit used " in thirteen states, which already had some banks in successful operation. However that may be, the author proceeds in the next sentence to say that " with the expiration of the charter of the first Bank of the United States, however, *both* of these situations had changed "—both of three ! The remainder of chapter iii ought to be labeled " No Thoroughfare ; " it is so hard to see what the author is driving at. Take this for a sample (p. 37), being the author's idea of the distinctions between the old Suffolk bank system and the free bank system :

The Suffolk system of New England had proved itself adequate to keep bank issues on a specie paying basis during times of severest strain—had sustained commercial credits when in all other sections they had failed. [Wrong ; the Suffolk and all the other banks of Massachusetts suspended

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specie payments for one year in the crash of 1837.] This was a system designed to protect "local" institutions when the forces of the country and of the central government were arrayed against them. [How arrayed against them?] From the Suffolk system was adopted the salutary principle of prompt redemption of current demand credit obligations. The free bank system of New York was distinctly the product of "local" and state as opposed to national financial interests; this was the result of the adaptation of independent commercial credit institutions to the demands for internal improvement and for the development of the latent resources of a politically organized "locality."

This is followed by an equally baffling account of the safety-fund system of New York. The wayfaring man, though not a fool, would be pretty sure to err in attempting to follow it.

Chapter iv, entitled "National Credit Money and the National Bank," piques curiosity to know what the national bank is. On page 43 we are told that after the passage of the legal tender act of 1862 the banks "failed to provide themselves with a coin reserve for the redemption of their demand obligations," but provided themselves with a cheaper form of legal tender money. This odd way of saying that the action of the government had banished specie from circulation is made more confusing by a foot-note which says that Boston was the last of the large eastern cities to adopt the United States note as a standard for payment. Reference is here made to a resolution of the Boston clearing-house dated August 27, 1861. As the legal tender act was not passed till February 25, 1862, the resolution could not have applied to it. Close examination of the text shows that it referred to an entirely different matter, but its introduction here makes it a new pitfall for the unwary.

On the next page (44) is another foot-note equally misleading. The author is arguing that legal tender notes were "found preferable to the diversified issues of banks," no reference being made to their enormous fluctuations in value. "This preferment," he says, "on the part of the banks, this decision to accept United States notes as reserve, this better service rendered by the Treasury as an agent of money issue paved the way to the tax which eliminated the credit issues of banks from our money circulation." Here the foot-note comes in, and it tells that the state banks were so impressed by the advantages of the greenback and the national banking system that they withdrew their opposition and voluntarily accepted the change, *i. e.* the ten per cent tax. The fact is exactly the opposite of this. The state banks fought against the tax with all their might and till the last moment. It was carried by a majority of only one vote in the House, after a prolonged and bitter fight.

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On page 47 we are told that under our present admirable monetary system

> if the holder of silver wishes greenbacks he may exchange silver for notes; if he has gold, and for convenience wishes silver certificates, these may be had; if he has any form of money other than gold and wishes standard money he may obtain this in exchange at par without discrimination. Thus every form of money is issued by the Treasury and all forms other than gold are made demand obligations for gold payment.

Every single statement here quoted is erroneous. On page 262 the author himself contends that silver dollars and silver certificates ought to be made convertible into gold as well as greenbacks and Treasury notes of 1890. Chapter iv ends without telling us whether "the national bank," referred to in the caption, is the United States Treasury or the national banking system. Chances favor the former. Indeed the whole book runs to the point that the government is the sole issuer of money, the currency function of the national banks being that of an automaton merely, and that our monetary system is the best in the world and ought to be continued. This conception involves, of course, the assumption that the majority in Congress will always be wise and good.

HORACE WHITE.

NEW YORK CITY.

The History of the Standard Oil Company. By IDA M. TARBELL. New York, McClure, Phillips & Co., 1904.—Two volumes: xix, 406; xi, 409 pp.

As the earliest, and up to the present, the most successful of the industrial combinations, special importance attaches to the history of the oil trust. This trust, moreover, affords unparalleled opportunities for study. Organized in an industry which was comparatively new, its course of development was little affected by the indefinable forces of a well-developed business tradition. From the outset the trust has been controlled by far-sighted men whose policy may be correctly interpreted in terms of enlightened self-interest. Speculative manipulation and internal corruption have been conspicuously absent. Moreover, as Miss Tarbell says in her preface,

> There is in existence just such documentary material for a history of the Standard Oil Company as there is for a history of the Civil War or the French Revolution or any other national episode that has divided men's minds.

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Much of this material was hidden away in court records, or in files of private letters; much of it, though published, is inaccessible to the ordinary student of practical economics. Miss Tarbell has rendered an inestimable service to the economist and historian through her collection of material which would otherwise have been practically lost. Moreover, she has weighed her facts with extraordinary judgment, and has produced a work which not only possesses great popular interest—witness its success as a serial in *McClure's Magazine*—but which must commend itself to every reader as a model of impartial and scholarly historical exposition. *The History of the Standard Oil Company* may be set down as the final, authoritative work on the subject. The future may possibly reject some of Miss Tarbell's conclusions; but there is no possibility that her findings of fact will be revised.

The opening chapter describes the rise of the petroleum industry. A discerning observer of the middle of the last century would have found reason for expecting the monopolization of the industry. The fluctuations in the supply of oil, the rapid changes in the technique of production, the extraordinary importance to the industry of means of transportation, all gave decided advantages to the large producer. Immediately after the war, when generals and colonels and captains were turned upon the country to earn a living by their wits, it was inevitable that there should be a rush of men into a new industry like that of oil production, and that business should assume a highly adventurous character. As a consequence oil refineries and oil wells were at first largely held by men who were enterprising rather than thrifty. The reckless waste and extravagance of the oil regions were such as characterize a new gold-mining district. It was inevitable that sooner or later some individual possessing both enterprise and thrift should deliver the oil pioneers of their business and property. This process would have taken time, however, had not the chaotic state of American railway policy afforded the strong a most effective weapon against the weak. Without railway discriminations, Mr. Rockefeller would gradually have extended his business, as would other refiners only less capable than he. In a few decades the oil business would possibly have become a monopoly. The producer of raw material would probably have become more or less subject to the refiner. But decades would have been required where years sufficed for Mr. Rockefeller under existing conditions. Armed with the rebate the Standard Oil Company was practically able to possess itself of whatever property it desired.

Apologists for trusts have been accustomed to second the business man's claim, that competition becomes so keen that business is carried on at a loss; consolidation therefore is justified as a means of self-

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preservation. In the oil business, at any rate, it would be difficult to point out a time when cut-throat competition existed, save as an incident to the absorption of a weaker firm by a stronger. In the early years of the industry profits were enormous. Increase in capacity for producing and refining petroleum lowered prices, and made it difficult for the inefficient producer to make profits. But there appears never to have been a time when a well-equipped plant did not make money. No one who reads Miss Tarbell's work can hold longer to the view that concentration in this case was necessary for the good of the industry. The oil trust was formed to keep prices "fair." But that does not imply that prices have ever been unreasonably low, except at times when the Standard was cutting to kill a rival.

The assertion is frequently made that there are conditions under which a monopoly will fix a lower price than would be fixed by competition. The economies of production on a vast scale make it possible for a trust to charge low prices and yet make profits; the elasticity of demand which characterizes the modern market insures great increase in sales with every fall in price. At any rate there is a conceivable case, then, in which a monopoly may find more profit in the extensive sales at a price lower than the competitive price than in the narrower sales at a higher one. The oil trust, if any, is in a position to show the advantage of low prices. The product is one which may find an ever-widening market with falling prices; the economies of producing on a large scale are enormous. Do we then find that the trust has lowered the price of oil? It has often been claimed that we do. This claim Miss Tarbell dissects in a masterly chapter on "The Price of Oil." Every important decline in the price of oil she proves to be due to the recrudescence of competition. Whenever prices are low, there is just one explanation: competition. The oil trust has found high prices to its liking. As it is absolutely unprejudiced in its pursuit of its own interest, we may feel sure that the hypothetical case in which monopoly price is lower than competitive price is of no practical significance.

In her conclusion Miss Tarbell argues that there is something radically wrong with our business ideals. The practices which have given such immense power to the Standard Oil Company are so obviously unfair that they would be scorned even by a gambler. Yet they do not differ in character from the sharp practice which prevails everywhere in business, from the corner grocery to the vast consolidation. As a proximate remedy for the evils of the present situation, the author suggests the abolition of the iniquitous rebate. But this does not go to the root of the matter, since there are other practices no less iniquitous which would not be touched by this reform. Accordingly, a

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radical change in our business ethics is recommended. To the reviewer it seems that we shall wait many centuries before this reform can be effective. Fair play in business is most desirable, but the tendency to drive a hard bargain is too deeply rooted in human nature to give way now when its possibilities are greatest. What we need most to recognize is that when a business has attained a predominant position in an industry, it assumes a quasi-public nature. Its policy is no longer to be judged from the view-point of private business. If the corner grocer secures rebates, or cuts prices to take a customer away from a competitor, he does not greatly enrich himself thereby, nor does he ruin his competitor. The social effects of the policy are negligible. But a great corporation which pursues the same policy vastly profits itself and utterly destroys its competitors, thereby attaining incalculable power for evil. What we need, then, is rather a special code, not of ethics, but of law, which shall scrutinize closely the acts of the great corporation and approve them or condemn them, not with regard to their kinship with similar acts in the small business, but with regard solely to their general social effects.

ALVIN S. JOHNSON.

COLUMBIA UNIVERSITY

Labor Problems: A Text-Book. By THOMAS SEWALL ADAMS and HELEN L. SUMNER. New York, The Macmillan Company, 1905. —xv, 579 pp.

A text-book on the labor problem was so urgently needed that even a mediocre performance in this field would have been welcome to teachers of the subject. Fortunately the book under review is a highly creditable production: clear, accurate, and on the whole adequate in its treatment. The twelve chapters—following the brief introduction —into which it is divided are arranged in two books. Book i, entitled "Evils," contains discussions of "Woman and Child Labor," "Immigration," "The Sweating System," and "Poverty, Earnings and Unemployment." Book ii, designated "Remedies," includes chapters on "Strikes and Lockouts," "Labor Organizations and Employers' Associations," "The Agencies of Industrial Peace," "Profit Sharing," "Coöperation," "Industrial Education," "Labor Laws" and "The Material Progress of the Wage Earning Classes." Each chapter is followed by a list of well-selected references, and the book concludes with three useful appendices and an excellent index.

It is perhaps inevitable that there should be differences of opinion as to what should be included in the treatment of the labor problem and as to the order in which different parts should be presented. But as it

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is vital to the success of a text-book that it should include the material that teachers wish to present to their classes, arranged in an order that is pedagogical if not logical, I shall not hesitate to criticise rather freely those aspects of the present work. From the point of view of content the omission that seems most regrettable is that of any treatment of the theory of wages. Even for students who come to the book fresh from a general course on economics, a brief outline of the theory of wages would be valuable, and for others it is well nigh indispensable. Without it readers are almost certain to lose their bearings among the mass of details presented in the body of the book and to ascribe quite undue importance to such factors as trade unions, or such facts as are peculiar to American experience during the last century, when the country was so dominated by its wealth of free land and natural resources, its abundant, not to say superabundant, supply of almost standardless negro workers, and its rising tide of immigration, that its "lessons" touching the labor problem must be accepted with the greatest caution.

Even more serious than this fault of omission are the faults of commission of which the authors seem to me guilty in the arrangement of their material. Logical as is the plan of taking up first "evils" and afterwards "remedies," there could be no clearer demonstration of its futility in connection with the labor problem than is furnished in these chapters that are supposed to conform to it. The chapters on "Woman and Child Labor," on "Immigration" and on "The Sweating System" treat not of these "evils," merely, but of the "remedies" for them and it is almost inevitable that they should do so, little as it agrees with the authors' plan of arrangement. On the other hand the chapter on "Poverty," *etc.*, the last chapter in book i, treats to be sure of "evils" but not of those to which organization, labor legislation or any of the other "remedies" discussed in book ii are applicable. The problem of the "submerged tenth" is undoubtedly closely akin to the labor problem and no fault is to be found with the authors for including an account of it in their treatise. The trouble is that their plan of division justifies the reader in expecting to find in book ii discussions of the different measures that are being taken to relieve and reclaim those who have fallen below the poverty line, and in this he is of course disappointed. Since the "remedies" described in book ii have, generally speaking, no direct connection with the "evils" described in book i the plan of arrangement seems quite pointless. Moreover, in book ii itself the confusion is increased by the fact that a chapter is devoted to "The Agencies for Industrial Peace," which are remedies for the "Strikes and Lockouts" described in a previous "remedy" chapter;

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while the final chapter on "Material Progress" can scarcely be regarded as a "remedy" for anything unless it be the gloom in which the reader's mind may have been left by his perusal of the chapter on "Poverty." It may appear that in this criticism far too much is made of a mere infelicity in the selection of titles for the two parts into which the work is divided, but unfortunately the defect goes deeper. The plan of division has resulted in a number of peculiarities of arrangement, such as the treatment of the labor legislation applying to women and children at the beginning, while labor legislation generally is discussed at the end, which together lessen in no small degree the usefulness of the book.

It is reassuring to turn from the arrangement of the book to the detailed contents of the chapters. The introductory sketch of "The Labor Problem and its Genesis" is admirable both for its reserve and for its inclusiveness. The chapter on "Woman and Child Labor" is also good, although not entirely free from errors. Thus "young persons" under the English factory acts are not, as stated on page 22, "children above the minimum limit," but minors above the *maximum* age limit of the class technically designated as "children" in the law, as the author herself implies on a subsequent page. Again, nothing is said to indicate that the early factory acts described on the same page applied only to cotton mills; nor are the distinctions still made prominent in the English law between textile and non-textile factories and factories and work-shops anywhere referred to. The statement that the consolidated act of 1878 "stood for a quarter of a century as the model factory law of the world" (p. 24) is fair neither to the British Parliament which frequently amended this act during the period nor to other countries, one of which, at least, more than overtook the model. Nor is it true, as stated in the next sentence, that the age limit was raised to twelve years by the act of 1902, this change having been introduced by the amendment adopted in 1895. On page 27, from the fact that the proportion of gainfully employed girls increased from 9 to 10.2 per cent from 1880 to 1890, while that of boys increased from 24.4 to 26.1 per cent the conclusion is drawn that the latter "showed a comparatively rapid rate of increase." As the rates of increase figure out 13⅓ per cent for girls and under 7 per cent for boys this is disconcerting.

The chapters on "Immigration" and "The Sweating System" are informing, but the facts given are not in all cases as recent as might reasonably be expected. Thus the statistics of immigration do not include those for the year ending June 30, 1904; the statistics in regard to the number of licensed work places in different cities are in no case

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for a later year than 1902; and finally no mention is made of the amendment which was added to the sweat-shop act of New York state early in 1904 and which modified in important respects the "present law" described on page 128. It is also a striking fact that, although the author recognizes the close relation between immigration and the sweating evil as it presents itself in the United States, she fails to include the regulation of immigration among the remedies for the latter discussed on pages 138–140.

Space will not permit an equally full discussion of the later chapters. Those dealing with organized labor and its problems are especially to be commended. Nowhere else will be found in equal compass so well-balanced and impartial an account of both the economic and the legal phases of the questions dealt with nor conclusions which reflect more accurately the opinions of contemporary economists. The chapters on "Profit Sharing" and "Coöperation" are less satisfactory chiefly because their tone is so largely negative. In this part of the book, if anywhere, the reader will be likely to question the truth of Mr. Adams's assertion that not only "will the far future take care of itself" but that "vague speculation about it is, if not injurious, at least useless as a base of immediate action." Even "vague speculation" about the future might supply a definite point of view from which to judge of the field that lies before the two plans of reform under consideration and it is this that sometimes seems wanting in these chapters. Thus the reader is told at different points that "in the most successful profit sharing experiments there is a strong tendency to progress towards true coöperation" (p. 347); that "coöperation is essentially democratic, while profit sharing is essentially paternalistic" (p. 379); and that coöperative "associations of producers are essentially anti-democratic in structure and are, in essence, merely profit seeking societies." These different statements may be at one "in essence," but in the absence of any reconciling social ideal they are somewhat confusing. The treatment of "Labor Laws" and of "The Material Progress of the Wage Earning Classes" with which the book concludes is excellent so far as it goes but is based rather too exclusively upon American experience.

Notwithstanding the defects that have been indicated, the book as a whole is well adapted for the purpose for which it was written. Considering the fact that in writing it the authors had no model to follow and had often to create as well as to arrange their material, it deserves to rank as one of the important recent contributions to American economic literature.

HENRY R. SEAGER.

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Monographs on Social Economics. Numbers I–V. New York State Department of Labor. Albany, 1904.—30, 30, 42, 60 pp.

One of the New York exhibits at the Louisiana Purchase Exposition last year was a set of four interesting little monographs on social economics prepared under the direction of Hon. John McMackin, commissioner of the state department of labor. The first of these, *Typical Employers' Welfare Institutions in New York*, was written by George A. Stevens and Leonard W. Hatch; the second, *Labor Legislation in New York*, by Adna F. Weber; the third, *The Work of the Department of Labor*, by Adna F. Weber and Leonard W. Hatch; and the fourth, *The Growth of Industry in New York*, by Adna F. Weber.

Out of the 108 concerns, employing 59,291 persons, which were found to have in successful operation in 1903 at least one of a considerable variety of measures designed to ameliorate the conditions of employment by other means than the raising of wages, shortening of hours or compliance with the factory and other labor laws, five typical establishments and their welfare work are described in the first of these monographs. It is noticeable that in two of the establishments described, the Solvay Process Company and the Roycroft Press, profit sharing of different types is a feature of the general scheme of welfare work, while in only one case, the Witherbee Memorial Hall of Mineville, are the employees benefited members of a labor organization.

The monograph on *Labor Legislation in New York* is both historical and critical, taking up the various subjects of legislative enactment, such as "Child Labor," "The Hours of Work," "Protection of Health," "Protection of Life and Limb," "Employers' Liability," "The Payment of Wages," and "The Right of Association."

The subject of the enforcement of these laws falls naturally into the third monograph, *The Work of the Department of Labor*, in which attention is called to the fact that though thirty-one states and the United States have labor bureaus, New York alone has a separate department of labor.

The fourth monograph is a somewhat elaborate statistical study, freely illustrated by charts and maps, of the industrial development of the state of New York.

On all the subjects treated in this series of monographs there is a considerable amount of compact, well-arranged material, valuable either for specific reference or for general information.

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BOOK NOTES

Trusts, Pools and Corporations (Boston, Ginn & Co., 1905; xxx, 477 pp.), edited by Professor William Z. Ripley, is the first of a series of economic source books which are to be published by Ginn & Company and which should lighten materially the task of teachers of economics. The editor's contributions to this volume include an excellent introduction, an article on "The Capitalization of Public Service Corporations," first published in 1900, and helpful notes to the contributions drawn from other sources. These contributions, of which there are seventeen in all, are about equally divided among articles descriptive of the principal trusts, articles explanatory of corporation and trust law and judicial records. Among the latter the findings of the receiver of the United States Shipbuilding Company and the decision of the supreme court in the Northern Securities Company case are especially valuable. The book concludes appropriately with Professor Bullock's article, "Trust Literature: A Survey and Criticism" which appeared first in 1901. Taken as a whole this first volume of the new series serves admirably its purpose of presenting a concrete picture of the principal phases of the trust problem. It is gratifying to record that as many as five of the thirteen articles reprinted from periodicals which it contains are drawn from the POLITICAL SCIENCE QUARTERLY.

The Annotated Interstate Commerce Act and Federal Anti-Trust Laws, by W. L. Snyder, of the New York bar (Baker, Voorhis & Company, 1905) is another addition to the numerous books on interstate commerce which have appeared during the last year. The present work contains the texts of all the federal statutes for the regulation of interstate commerce together with full notes of all decisions of the supreme court of the United States, as well as of the lower federal courts, relating to combinations and conspiracies in restraint of trade between the states. The work is rather a compilation than a treatise but as such it is convenient and useful. There seems to be a good deal of useless repetition and the work is not entirely free from errors, as for example the statements (p. 2) that an act of Congress may be challenged on the ground of denial of equal protection of the laws and (p. 125) that the merger case arose out of a suit to dissolve the Northern Securities Company.

Organized Labor and Capital (George W. Jacobs and Co., Philadelphia, 1904; 226 pp.), is the title given to four lectures delivered

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before the Philadelphia Divinity School in 1904 on the William L. Bull foundation by the Rev. Washington Gladden, Dr. Talcott Williams, and the Revs. George Hodges and Francis G. Peabody. As the subjects of the lectures—"The Past," "The Corporation," "The Union," and "The People"—indicate, they constitute together a systematic if somewhat popular course on the labor and trust problems. Especially valueable are the lectures of Doctors Gladden and Williams. The history of labor could hardly be more happily summarized than in "The Past," and the story of "The Corporation" is enriched with statistical information which even the professional economist may examine with profit.

In *Conciliation et Arbitrage* (Victor Lecoffre, Paris, 1905; 228 pp.) Dr. C. de Fromonts de Bouaille, advocate of the court of appeals of Lyons, has brought together in brief compass an account of the different plans of conciliation and arbitration in use in the principal countries of the world. Following a brief introduction, part i devotes separate chapters to England, the United States, Belgium and Holland, Germany and Austria, the English colonies and other countries. Part ii treats entirely of France, describing in separate chapters "Private and Governmental Conciliation and Arbitration," and leading up to the author's "Conclusion." This is in brief that compulsory arbitration of the New Zealand type, or even the compulsory formation of boards of conciliation and arbitration, involves an unwarranted interference on the part of the state with individual initiative, and that the road to industrial peace lies through the voluntary coming together of employers and workmen, which is to result in turn from the development in the minds of the former of a more lively sense of their social obligations.

Industrial Conciliation and Arbitration (P. S. King & Son, London, 1905; 241 pp.), by Douglas Knoop, was first written in competition for the Shuttleworth scholarship at the University of Manchester. As a critical review of the experiments that are being made with different plans of conciliation and arbitration in different parts of the world, liberally supplied with statistical tables, bibliographical notes and the other apparatus of exact scholarship, it is more satisfactory than it is convincing as an argument. The author concludes from the statistics of strikes during the last two or three decades that nothing is "clearer than the great growth of industrial peace in the United Kingdom," and "that no other great industrial country can claim to be in a position comparable with that of the United Kingdom" (p. 181). The United Kingdom being the most advanced industrial nation of the world, it follows—and here he quotes from Colonel Wright—that "the era of great strikes and lockouts is passing away and . . . the rule of reason

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is asserting itself" (p. 187). Before jumping hastily to this conclusion the author might have taking warning from Mr. Wright's own experience. When he wrote the article from which the above quotation is taken (1892) the "strike curve" for the United States was moving downwards, as it continued to do during the years of depression of the middle nineties. With the great industrial expansion of the late nineties and the first years of the new century, however, there has come an era of strikes that makes Mr. Wright's opinion sound now more like a pious hope than an inspired prophecy. May it not very well be that the seemingly happy situation as regards industrial strife which the United Kingdom has enjoyed since about the time of the Boer War is simply the one bright side of that industrial depression of which so much has been written and which has caused the problem of the unemployed to take the place, it is to be hoped only temporarily, of the problem of strikes and lockouts? Certainly this interpretation seems to harmonize better with the statistical evidence, on which the author so largely relies, than his own view that the United Kingdom's immunity from industrial disputes is the result of its higher degree of industrial development. But this merely illustrates how little dependence is to be placed on a merely statistical argument in connection with a problem in which the forces involved are so complex.

M. André-E. Sayous, general secretary of the Fédération des Industriels et des Commerçants Français, has published under the title *Le Marin Anglais* (Fédération, *etc.*, Paris, 1905; 163 pp.), an interesting description of the life and occupation of the British sailor which is designed to suggest possible reforms in the position of his French cousin. He is full of enthusiasm over the improvements in the sailor's lot made partly through private agencies and partly through governmental interference during the reign of Victoria, and he characterizes the maritime code of 1894 as well worthy of foreign imitation. On the other hand, he is clearly aware of the obstacles which the intense international competition of the present day puts in the way of reform in an industry that is essentially international in its character, and he seems to think that the protection of the sailor offers a proper field for joint action on the part of the world's great maritime powers.

Dr. J. Russell Smith's monograph on the *Organization of Ocean Commerce* (Publications of the University of Pennsylvania, series in Political Economy and Public Law, Philadelphia, 1905), is a timely and instructive contribution to commercial economics. While it does not purport to give an exhaustive discussion of ocean trade, it does present in a lucid and attractive form the essential elements of the sub-

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ject. The work concerns itself chiefly with the technique of the carrying trade, and leaves untouched the familiar problems of public policy in regard to shipping. None the less the student of commercial policy will find it well worth his perusal.

Cochrane's *Modern Industrial Progress* (Philadelphia, Lippincott, 1904; xxvi, 647 pp.), is a popular account of recent mechanical inventions especially in the United States. It is not an economic history, for the social implications of the changes in technical methods are not discussed; neither is it a connected description of the evolution of the mechanisms under consideration. The author has seized upon the striking and dramatic features of recent mechanical achievements and has written a story that will doubtless interest and entertain the layman in applied science. He has evidently not gone very much into the historical side of his subject or he would not have attributed the development of the loom mainly to Arkwright (p. 488). The loom was not worked to advantage until ten years after the death of Arkwright; and the credit of the invention belongs to Cartwright, although its practical development was the work of a number of later mechanics.

Among recent works bearing upon the British fiscal problem is a new edition of List's *National System of Political Economy*, translated by Mr. Sampson S. Lloyd (London, Longmans, 1904). The work is introduced by an illuminating critical essay by Professor J. Shield Nicholson, and a brief memoir of List. In many respects this appears to be the best English translation of List. Possibly the work would have been more useful had the translator made freer use of foot-notes to correct some of the errors in List's interpretation of history.

Another work designed to throw light upon the same problem is Professor Nicholson's *History of the English Corn Laws* (London, Swan Sonnenschein, 1904; 188 pp.). In this little book the author has put into convenient form the results of recent historical studies relating to the nature and working of the early system of regulation of the corn trade. In Professor Nicholson's opinion, the corn laws were in early modern times advantageous from the national point of view. In the eighteenth century, however, the restrictions upon importation became superfluous, and in the end exerted a most pernicious influence upon the producer of corn as well as upon the consumer. So far as modern conditions are concerned, Professor Nicholson inclines to the view that a protective duty on corn would be injurious to the nation as a whole.

The Liberal View (London, P. S. King, 1904) is a series of short essays on current politics by members of the '80 club. As one would expect, over half of the essays relate to the fiscal problem; the remain-

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ing essays range from municipal ownership to the Macedonian situation. The list of writers includes such well-known names as Mr. Bryce, Lord Brassey and Sir Charles Dilke. This does not, however, insure the reader against a somewhat superficial treatment of most of the topics discussed.

Canada and the Empire (London, P. S. King, 1904; 198 pp.), is an essay by two young Englishmen, Mr. Edwin S. Montagu and Mr. Bron Herbert, who visited Canada in 1904 to inquire into the Canadian attitude toward an imperial Zollverein. The authors found nothing to justify the faith of those who expect the colonies voluntarily to enter into closer economic relations with Great Britain. Canada apparently intends to maintain her industrial autonomy; and Great Britain has nothing to offer her which would be regarded as a fair equivalent for its surrender. For the rest, Messrs. Montagu and Herbert found the Canadians perfectly loyal to the empire. Greater consideration for Canadian interests in international affairs is the only thing needed to establish perfect harmony between the colony and the mother country. Incidentally the authors learned a good deal about the agricultural and commercial possibilities of Canada, and their account will prove interesting to readers in "the States." It is especially interesting to learn that Sir Wilfrid Laurier's cold attitude toward the United States has been so successful that it now "seems remotely possible that the vast bulk of the States may plunge down upon its knees to Canada" (p. 63).

Studies in Colonial Nationalism (London, Arnold, 1904; x, 336 pp.) is the title of a collection of essays by Mr. Richard Jebb on certain aspects of British imperialism. The main object of the work is to set forth the positive forces and conditions which must be taken into consideration in all plans for closer unity. The particular phenomenon which engages the author's attention is the growth of a colonial independence which counteracts all attempts at the promotion of a practical federal union. In contradistinction to the imperialism which rests upon colonial loyalty and race patriotism, Mr. Jebb places an imperialism which frankly recognizes the separatist and nationalist tendencies of the various colonies; indeed, he goes so far as to propose the equality of the parliaments of Great Britain, the Dominion, and the Commonwealth, united only under the crown as a figure-head and symbol of intimate alliance (p. 300). He denies the necessity of the time-honored unity in the control and administration of the army and navy and advocates the encouragement of the colonies in the development of their own forces, thus equalizing the burden of defence which is so disproportionately heavy on the home tax-payer. The conception of a Zollverein, in the sense of free trade within the empire and protec-

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tion against the world, Mr. Jebb regards as visionary, and for it he would substitute a tariff system formed by independent arrangements not unlike international commercial treaties. Colonial governments must evolve from their own conflicting interests propositions acceptable to Great Britain. Chapter ix is an argument for protection. The theory that a tariff must throw a burden of increased prices on the consumer is rejected, and the aim of modern protection is formulated as the support of home industries, not by raising prices but by restricting imports, so as to give the home manufacturers that stable and extensive market which is often the indispensable condition of production at the lowest cost. The great problem, therefore, before British democracy is the establishment of a tariff system that will enable the United Kingdom to meet the voluntary propositions of the autonomous colonies for a consolidation of the empire on the basis of an adjustment of material interests. The dependencies rightly enough are regarded as presenting problems which require special treatment on independent lines.

Economie sociale, by Professor Charles Gide (Paris, L. Larose and L. Tenin, 1905; 465 pp.), is a reprint of the report on social economy to the universal exposition of 1900. Since that report is difficult of access, the reprint will prove valuable to a wide circle of readers. The name of its author is a sufficient guaranty of the scholarly character of the book. It gives in brief compass a comprehensive review of the work of the various social-welfare institutions of the nineteenth century, and suggests the more fruitful fields for further social reform.

The fourth volume of the *Handbuch der Wirtschaftskunde Deutschlands* (Leipzig, B. G. Teubner, 1904; 748 pp.) is devoted mainly to the technique of trade and transportation. The volume will prove not less useful than the earlier ones to all who wish a thorough understanding of the economic conditions of Germany.

It is both amusing and depressing to have to credit the latest contribution to "English As she is Wrote" to the prospectus of the new *Vierteljahrschrift für Social- und Wirthschaftsgeschichte* to be published by W. Kohlhammer, of Stuttgart, under the editorship of Professors St. Bauer (Basel) and von Below (Tübingen) and Dr. Hartmann (Vienna). Space will permit the quotation of only a few of the choice sentences in which the merits of this new periodical are unfolded to the English reader. Its purpose is declared to be to "serve the investigation of economical conditions and developments of all times and nations and keep distant from the treatment of problems of the theoretical and national economy of the present time." But the foreign reader need not fear that it will be too exclusively German—notwithstanding "the

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external circumstances that meanwhile in Germany the economical historical studies flourish the most"—because "there are indeed in the social and economical history enough problems of international characters which may not be dissolved within the frame of history of a single nation." Consideration for our colleagues deters us from publishing the names of the "renowned scholars who in different countries have engaged to regular fellow-work," especially as they have the assurance that "contributions composed in German, English, French or Italian" will be published in the language in which they are written. Alas, that the publishers did not apply the same salutary rule to prospectuses, at least until they could secure the services of a competent English translator!

In his *L'Expansion de la nationalité française* (Paris, Colin, 1903; 215 pp.) M. Novicow describes not only the increase of French territory and population, but also the spread of French language and culture among other peoples. He does not share the opinion of those who regard France as a declining power. The birth-rate may be stimulated by new economic forces. For example, the extensive utilization of water-power in Alpine regions might transform Dauphiny into a Lancashire. In a century or more two hundred millions in Africa and Asia may become a part of the French nationality by adopting the language. That language, moreover, promises to become the international means of communication, and thus the way will be opened for vast additions to the domains of French science, literature and art. As a means of advancing this intellectual and moral imperialism, M. Novicow pleads for the simplification of French orthography and syntax and the organization of domestic publication, with a view of meeting the demands of a vast cosmopolitan public.

The student of sociology will find a great deal of interesting material in the late Lafcadio Hearn's *Japan: An Interpretation* (New York, Macmillan, 1904). The key to the Japanese social organization is to be found in the native religion; and this an occidental will always find extremely difficult of comprehension. The author appears to have divested himself quite thoroughly of western prejudices—at any rate, he approaches his subject from a point of view which is certainly not occidental. The Christianization of Japan Mr. Hearn regards as a menace to a social order which contains much that the world can ill afford to lose; and he treats the adoption of western methods in industry and western political ideals as by no means such clear evidences of progress as we are wont to assume.

A Modern Utopia, by Mr. H. G. Wells (New York, Charles Scribner's

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Sons, 1905; ix, 343 pp.), proves that there is no field so barren that a man of genius cannot make something out of it. Mr. Wells' utopia is a whole world, lying somewhere beyond Sirius—a duplicate of our own world, but with whatever seems undesirable to the author eliminated. This utopia differs from all others in that it is progressive, and in that it grants the freest play to individuality, without suffering the individual to make himself a public nuisance. As the author realized that even his own inimitable style could hardly induce the general reader to struggle through the desperately serious discussion of woman's dress, artistic railway bridges, and stirpiculture, he was obliged to insert a shadowy little romance, unique in its tiresomeness. In his preface Mr. Wells tells us that this is to be his last contribution to social science. Let us hope that we need not take this more seriously than most of his other statements. Social science can ill afford to lose a writer who can rise to such philosophic heights as the following sentence suggests: "Perfection is the mere repudiation of that ineluctable marginal inexactitude which is the mysterious inmost quality of Being."

A Report on the Diplomatic Archives of the Department of State, 1789–1840, by Professor Andrew C. McLaughlin, appears among the papers issued by the bureau of historical research of the Carnegie Institution (Washington, 1904; 73 pp.) The results of his investigation are (1) that many important state papers have not been published; (2) that, even when a series of papers relating to a particular subject has been printed, important documents have often been omitted; and (3) that, when extracts from documents have been given, the omitted portions often contained valuable historical information which need no longer be kept from the public eye. These conclusions are in a general sense undoubtedly sound. This may be conceded without admitting that disclosures which could be made would often essentially change our understanding of events. No matter how freely a foreign office may be disposed to disclose the contents of its records, the interests of the public service will require the reservation of some papers which are really important, and of still more which may fall within the category of things not so important as they are "interesting." Professor McLaughlin remarks, of a certain series of dispatches from Richard Rush, that they "certainly prove that Rush was one of our ablest diplomatists." Perhaps little additional proof was needed of the ability of a diplomatist of whom an eminent senator, quoted by Trescot in 1852, declared that in the course of an unusually long and important diplomatic career he had "never said a word that was improper, nor betrayed a thought that might peril his country's fortunes." Trescot

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thought that this encomium was not extravagant, and the justice of it has probably never been disputed by any one familiar with Rush's work.

It is gratifying to find that the legislature of Georgia has followed the example of North Carolina in providing for the publication of its records which relate to the colonial period and the Revolution. Two quarto volumes have already been issued (*The Colonial Records of Georgia*, compiled and published under authority of the legislature, by Allen D. Candler, Atlanta, 1904, 578, 525 pp.). These contain the Journal of the Trustees from 1732 to the surrender of their charter in 1752, and the Journal of the Common Council of the Trustees during the same period. In volumes to be subsequently published the Private Journal of the Trustees, the journal of William Stephens and the various records of Georgia while it was a royal province will be printed. Great effort has been made to make this collection of the records of Georgia exhaustive. The editing has also been well done, and the publication will rank with the best works of this kind which has yet been done by the different states. It is to be hoped that the example of North Carolina and Georgia will soon be followed by South Carolina, and its valuable colonial records will be given to the public in printed form.

The third volume of Mr. Herbert Paul's *History of Modern Englana* (New York, The Macmillan Co., 1905, 454 pp.) has appeared. It continues the narrative from the death of Lord Palmerston and the accession of the Russell-Gladstone ministry in 1865 to the summer of 1876. The second Disraeli government was then in office, but had not yet fully developed its foreign policy. In style and method the characteristics of the earlier volumes are continued. By giving attention to literature and ecclesiastical affairs, to industrial progress as well as to the larger political questions which arose in foreign as well as domestic relations, a very comprehensive account of the development of modern England is given. Though not distinctly a book of scientific value, it contains decidedly the best general account of the period which has yet been produced.

Mr. C. Grant Robertson, in his *Select Statutes, Cases and Documents* to illustrate English constitutional history, 1660–1832 (New York, G. P. Putnam's Sons), has rendered a distinct service to teachers. After the manner of Brothers and Gardiner, though without their elaborate introductions, he has printed a judicious selection from the statutes of the period and from the state trials which most directly illustrate constitutional development. In an appendix material is also given which illustrates impeachments, taxation and supply, the poor

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law, local government, justice and the franchise. Such a book as this upon the period has long been needed.

Under the title of *Ireland's Story* (Houghton, Mifflin & Co.; 414 pp.), Charles Johnston and Corita Spencer have produced a text-book of unusual excellence. It is intended not only for schools, but for reading circles and general readers. Its excellence consists not only in the illustrations and the naturalness of the style, but in the fact that it is written from a genuinely Irish standpoint, with abundant illustrative material of a literary and archæological character and without undue partisanship.

In his *Vue générale de l'histoire de l'Europe* (Paris, Colin, 1904), Professor Ernest Lavisse sketches the development of the European history from the beginnings of Greek civilization to the present time. The leading characteristics of antiquity, of the middle age, of modern times and of the nineteenth century are brought into clear relief, and the whole forms a valuable summary for both student and general reader.

Professor Karl Lamprecht has published under the title, *What is History?* (Macmillan, 1905; 227 pp.), the lectures which last autumn he delivered in this country. The theory which the book is intended to defend is that the process of historical development is social-psychological. After sketching from this standpoint the course of German history, the author broadens the outlook to that of periods of world culture in general. The book culminates in an effort to show what a true universal history should be. It should be a work which sets forth types of culture exclusively, with the transitions which lead from one to another. The thought is lofty and suggestive. Especially forcible is the author's description of the mental condition of excitability which has been produced among all western people by the social fermentation of the last thirty years.

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